

(24,977)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 694.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY  
COMPANY, PLAINTIFF IN ERROR,

vs.

C. A. STARBIRD, ADMINISTRATOR OF THE ESTATE OF  
ADAM MILLER, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

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1 In the Crawford Circuit Court, Special Adjourned Term,  
February 11, 1914.

*Caption.*

Pleas Before the Honorable Jephtha H. Evans, Judge.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,  
Appellant,

VS.

ADAM MILLER, Appellee.

Pleadings had on February 11, 1914.

Appeal granted February Sixteenth, 1914.

Transcript Compiled by A. Hays, Circuit Clerk of Crawford  
County, Arkansas.

Comes the defendant, St. Louis, Iron Mountain & Southern Rail-  
way Company, and prays an appeal from the judgment herein to the  
Supreme Court of Arkansas.

ST. LOUIS, IRON MOUNTAIN &  
SOUTHERN RAILWAY CO.,

By THOS. B. PRYOR,

*Attorney for Defendant.*

Appeal granted January 29, 1915.

P. D. ENGLISH, *Clerk*,

By W. P. SADLER, *D. C.*

2 *Complaint.*

In the Crawford County Circuit Court.

ADAM MILLER, J. L. WRIGHT, C. A. YOUNG, and OLIVER KEAP,  
Plaintiffs,

VS.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,  
Defendant.

*Complaint at Law.*

The plaintiffs for their cause of action against the defendant, St.  
Louis, Iron Mountain & Southern Railway Company, state:

That the defendant, St. Louis, Iron Mountain & Southern Rail-  
way Company is now and at the several times hereinafter set forth  
a corporation organized under the laws of the State of Arkansas, and  
was at said times the owner, lessee, operator and manager of a line  
of railway from the town of Greenwood to the city of St. Louis, Mo.,  
with some kind of an arrangement unknown to the plaintiffs to

transport said peaches from there to the city of New York by railway and water and that said defendant company was a common carrier of goods and property.

That the said plaintiff, Adam Miller, by and through his agent, L. A. Taylor, made a contract of purchase of the peaches in the hereinafter named car on or about the 23rd day of July, 1907, from the other plaintiffs above mentioned who were the owners of said peaches in said car and agreed to pay therefor the sum of \$1.25 per crate on board the cars at Greenwood, Ark., but on account of the negligence

of the defendant company in failing to take care of said  
3 peaches in transit by icing the car and other acts of negligence hereinafter set forth, the peaches arrived in the city of New York in such a rotten and damaged condition and that on account of such damaged condition of the peaches in the hereinafter named car, it was purposed by Adam Miller, one of the plaintiffs herein that he would pay sixty-five cents per crate to Robert A. Rowe as agent and attorney for the plaintiffs who were the owners of the fruit in the following named cars, to-wit: A. R. T. cars Nos. 10542, 8787 and institute suit against the said defendant company and in consideration of said plaintiffs accepting said sum on the peaches on the condition they were in, and that the plaintiff Adam Miller would give and divide with the other plaintiffs in this case one half of the damages recovered and the plaintiff Adam Miller one-half, making the damages equally divided between Adam Miller and the other plaintiffs in this action.

That the plaintiffs, J. L. Wright, C. A. Young and Oliver Keap tendered and delivered to the defendant company at its station at Greenwood, Ark., and that said defendant at the time and place mentioned accepted for shipment 490—6 basket crates of peaches, which peaches were at the time tendered and delivered to defendant company and accepted by it sound, firm and in good shipping, salable and merchantable condition, which the defendant at the time undertook, assumed and agreed to load properly in its car, refrigerator said car sufficiently to prevent said peaches from decaying, to handle them with care, and made a *weigh* bill in which the said defendant company agreed to transport the same from Greenwood, Arkansas, to the city of New York without delay and then deliver

the same in a marketable condition to the said Adam Miller  
4 in consideration of which, the plaintiffs, Adam Miller undertook to pay said defendant company the ordinary and reasonable charges for such service, a copy of which *weigh* bill can not be attached hereto for the reason the same is in the possession of the defendant company.

That after said defendant loaded said peaches in its refrigerator A. R. T. Car No. 8787 and after said peaches had been loaded they appeared in said way-bill from L. A. Taylor, Greenwood, Ark., from — Adam Miller to New York.

Plaintiff states that in the ordinary course of transit from Greenwood, Ark., to the city of New York said car of peaches should and would have arrived at said city of New York on the 28th day of July, 1907; that said peaches on the market in said city of New

York on the 28th day of July, 1907, in a sound, marketable condition was worth the sum of \$2.25 per crate or the total sum of \$1,102.50, but by reason of the defendant's negligence and carelessness in handling, moving, and caring for said peaches, as hereinafter set forth, said peaches became too hot and thereby wilted, shrunk, moulded, bruised, and decayed so that they did not and would not bring the price of sound and marketable peaches on the market in said city, but on said market in said city was reasonably worth and sold for only the sum of \$539.00.

Plaintiffs state that said negligence and carelessness on the part of the defendant company, consisted in this, to-wit:

1. That said defendant failed, refused, and neglected to put in a sufficient amount of ice in said car before it was sent to Greenwood, while at Greenwood and before it left Greenwood, Arkansas; that it failed, neglected and refused to keep ice in said car sufficient to keep said peaches firm and sound until said car reached its destination; that it failed, refused and neglected to move said car of peaches out of the town of Greenwood, Ark., for more than 24 hours after said peaches were loaded in said car and ready for shipping.

2. That the defendant negligently failed, refused and neglected to load said peaches for shipment, but negligently allowed the same to remain on the platform at its said station at the town of Greenwood, Ark., for more than 24 hours after said peaches had been tendered, delivered and accepted by said defendant company for shipment.

3. That the said defendant company negligently delayed said car of peaches while in transit between Greenwood, Ark., and New York City for more than 8 days, by reason of which plaintiff was damaged in the sum of \$563.50.

4. That the defendant company negligently and carelessly loaded said peached into a broken, defective and unsuitable car, that said defects consisted in this: that the doors of said car were swollen and warped to such an extent that the same could not be closed or fastened; that the bunkers were too small to hold a sufficient amount of ice to keep the peaches cool enough to preserve them and the space above the peaches when loaded too small to contain a sufficient amount of cold air to preserve them.

5. That the said defendant negligently failed and refused to handle said car with care but handled the same with such unnecessary force and violence said peaches were bruised and mashed.

6. Plaintiffs state that they paid for and caused to be paid to the defendant company freight and refrigeration charges demanded by said defendant.

6

#### Paragraph 2.

That the said defendant overcharged plaintiff with the sum of \$100.00 as freight which was in excess of public tariff on peaches from Greenwood, Ark., to the city of New York to amount of said sum.

That by reason of acts and negligence on part of defendant company as aforesaid the plaintiffs have sustained damages in the sum of \$563.50.

Paragraph 3.

Plaintiffs further state that during the transit of said car of Elberta peaches from Greenwood, Arkansas, to New York City, the defendant company under the common law owed the plaintiffs the duty to keep said car of peaches properly iced and refrigerated so as to keep the peaches sound, firm and prevent them from decaying and during transit the defendant company carelessly and negligently failed to keep said car iced so as to keep the peaches from decaying; that by reason of said negligence and failure on the part of the defendant company the peaches in said car were heated, scalded, specked and rotten by reason thereof to plaintiff's great damage in the sum of \$563.50.

Paragraph 4.

Plaintiffs further state that after said car of peaches had been received and loaded into said car in a firm, sound and merchantable condition, a receipt or bill of lading was issued, after said car was shipped, and delivered to L. A. Taylor, agent of the plaintiff Adam Miller, in which Greenwood, Arkansas, was mentioned as a shipping point and New York City as the place where the peaches were to be shipped and that Adam Miller then resided in New York City to whom the said receipts or bills of lading were made and by the said Adam Miller delivered to the delivering carrier and are now in the possession of the defendant company, copies of which have been requested of F. B. Anderson, agent at Greenwood, and Lovick P. Miles, the attorney of the defendant company, which they both failed to furnish and for that reason plaintiffs are unable to file a copy of of the receipt or bill of lading herewith.

What purports to be a copy of the bill of lading is herewith filed marked exhibit "A," but plaintiff does not know whether any portion of it is a copy, except what is filled in with pencil. It was attached under order of the court.

In addition to the allegations in the original complaint herein and as an amendment thereto, plaintiff alleges:

That after said peaches were delivered to and accepted for shipment by the defendant, and had been loaded into said car for shipment, and without further consideration passing and without special rate, the defendant issued and delivered a receipt or bill of lading therefor and in the name of L. A. Taylor the agent or Adam Miller, consignee in the bill of lading, the name of each one of said parties appearing in the bill of lading that was delivered to L. A. Taylor.

That the defendant used no other form of receipt or bill of lading and would not have given plaintiff, Adam Miller, any other or a different form which fact were well known to L. A. Taylor, his agent, at the time the bill of lading or receipt was issued and that Adam Miller paid full rates upon said shipment.

(Here follows bill of lading marked page 7½.)

# St. Louis, Iron Mountain & Southern Railway Co.

LEASED, OPERATED AND INDEPENDENT LINES.

*Cut* Division of *St. M. & S.* Railway.

## RATES

1907

7/23

RECEIVED FROM *L. A. Taylor*

the following property, in apparent good order, marked and numbered as per margin, to be transported from *Greenwood*

to *Adams Miller New York City* and delivered to the

consignee, or a connecting common carrier. The property aforesaid may pass through the custody of several carriers before reaching its destination, and it is understood as a part of the consideration, for which the said property is received, that the exceptions from liability made by such carriers respectively shall operate in the carriage by them respectively of said property, as though he had inserted at length, and especially that neither of said carrier or either of them, or this Company shall be liable for leakage of any kinds of Liquids, nor for losses by bursting of Casks or kegs of Liquids, nor from expansion or other unavoidable causes, breakage of any kind of glass, Carboys or Acid, or articles packed in glass, Stoves and Stove Furniture, Castings, Machinery, Carriages, Furniture, Musical Instruments, or of any kind of pack, or for loss or damage of Hay, Hemp, or for loss of iron or iron articles, or for loss or damage of Eggs; or for loss or damage of any kind, occasioned from being on open cars, or for leakage of Grain in bulk, or for damage to personal property of any kind, occasioned from being on open cars, or for loss or damage of leather, or for loss or damage by fire or for loss or damage on seas, lakes, canals or rivers. And it is further especially understood, that for all loss or damage occurring in the transit of said property the legal remedy shall be against the particular carrier only in whose custody the said property may actually be at the time of the happening thereof—it being understood that

## ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY CO.

LEASED, OPERATED AND INDEPENDENT LINES,

in receiving the said property to be forwarded as aforesaid, assumes no other responsibility for its safety or safe carriage than may be incurred on its own road. All goods carried by this Company are recharged at actual gross weight, excepting such articles as are otherwise provided for in the Tariffs and Classifications.

All property will be subject to necessary coöperation. Carriers will not be accountable for loss in weight arising from unavoidable causes. Claims for damages must be reported by consignee, in writing, to the delivering line within thirty-six hours after the consignee has been notified of the arrival of the freight at the place of delivery. If such notice is not there given, neither this Company nor any of the connecting or intermediate carriers shall be liable. In the event of the loss of property under the provisions of this agreement, the value or cost of the same at the point of shipment shall govern the settlement.

NOTICE.—The responsibility of this Company as a common carrier terminates upon arrival of the property at station or place of delivery. Free storage will be given for forty-eight hours thereafter (exclusive of Sundays and legal holidays) at the risk of the owner; if not removed at the expiration of that time the property will, at the option of the carrier, either be removed and stored in a public warehouse, at owner's cost and risk, or will be retained in the carrier's possession, as warehouseman, subject to warehouse charges. If property covered by this bill of lading is

Charges Advanced, \$

If 1st Class.....cts. per 100 lbs.

If 2d Class.....cts. per 100 lbs.

If 3d Class.....cts. per 100 lbs.

If 4th Class.....cts. per 100 lbs.

If 5th Class.....cts. per 100 lbs.

.....cts. per 100 lbs.

.....cts. per 100 lbs.



**Flour and Meal** ----- **per bbl.**

**Beef, Pork and Fish** ..... per bbl

**Special** **Per**

**NOTICE.**—In accepting this contract, the shipper or other agent of the shipper, on behalf of the shipper, will be present to receive the goods and to sign bills of lading for the goods, and to accept the goods and to agree to all its stipulations and conditions.

AT

**27-WEIGHT AND CLASSIFICATION SUBJECT TO CORRECTION.**

## LIST OF ARTICLES:

WEIGHT.

490-6 Bah-Peaches

2000

Dr. L. L. L.

Defg

2200.0

8787

APY.

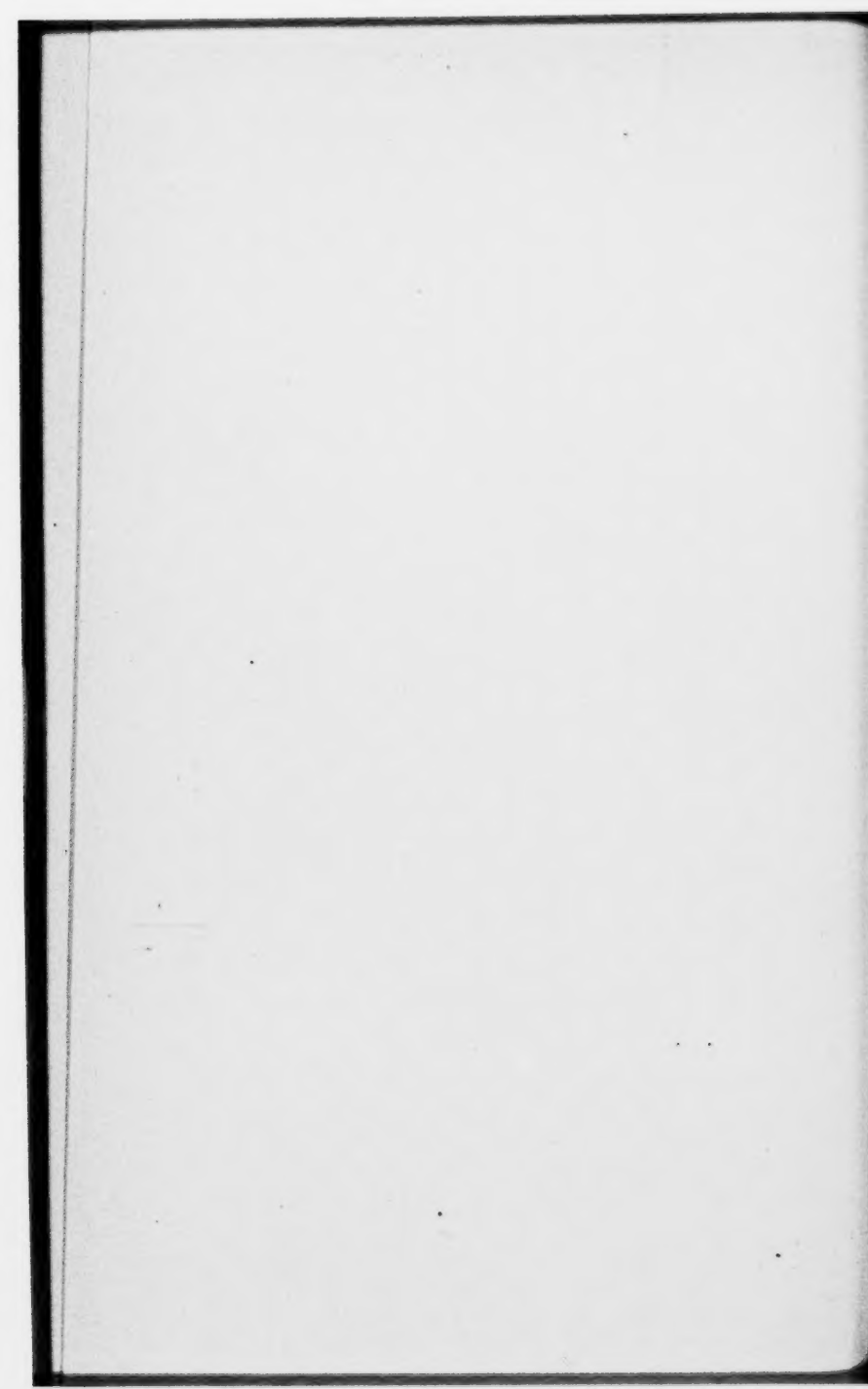
Reece A Smith

Little Rocks and

every twenty four  
hours throughout

 $\frac{1}{2}$





8 That said writing contained a clause providing that in case of damage to said fruit that the consignee thereof should give notice to the delivering carrier of an intention to claim damages within thirty-six hours after notice of arrival of the freight at the place of delivery.

That said clause was inserted therein without the consent of the plaintiff, who did not see the bill of lading until several days after it was issued as the plaintiff Adam Miller was in New York at the time, or of the owners of said fruit or of the consignor thereof. That said provision was unreasonable in this, to-wit: That the consignee thereof lived in New York City and did not know at the time he learned of the damaged condition of the peaches whether it was the fault of the consignor or shipper, or the fault of the defendant company so as to know whom to claim damage against and could not ascertain the damage and report the same in said time as the consignor and owners of the fruit resided at Greenwood, Arkansas, as at the time the fruit was shipped and at the time it arrived in New York City; that it was more than thirty-six hours before this fruit in said car could be examined in the regular course of business and the loss discovered and report the same; that said car of peaches were delivered by the Pennsylvania Railroad Company, the terminus of which line of railway is at Jersey City, N. J., where its depot ground and railroad buildings are located, from which place its cars were run on to the railroad floats or barges and towed over North River to the dock of said railway company an early part of night and no one is permitted on the cars, barges or dock except the employees of said company; that the cars were unloaded while on the barges by the employees of the Pennsylvania Railroad Company, the delivering carrier who inspected and examined the peaches

9 and who knew of their own knowledge the rotten condition they were in as the top and sides of the crates were open so that the peaches were plainly seen by the agents and employees of said company as they unloaded them and placed them on the dock and said agents of said company saw and knew the damaged condition of the peaches; that the dock master whose name is unknown to plaintiffs was given notice by Adam Miller and in addition to this, had actual knowledge of the damaged condition of the peaches. Adam Miller gave the notice within thirty-six hours. That there is no agent of the delivering carrier designated in the bill of lading on whom notice of a claim of damage could be served; that the agents of said company were in the State of New Jersey. That the defendant company knew that the peaches would rot in transit if they were not iced as they were perishable goods and in their custody under their control and it was unnecessary for notice to be given them of the fact they already knew and the defendant charged with knowledge of the damaged condition of the same. Plaintiffs further allege that said defendant knew and had actual knowledge when it loaded said car of peaches at Greenwood, Ark., that said car was not properly and sufficiently iced so as to preserve and protect them from becoming too hot and decaying; said defendant had

actual knowledge at the time said peaches were loaded that they were perishable property and unless kept iced they would decay.

They knew at the initial point as well as at the point of delivery they were rotten. The plaintiff- *has* duly performed all of the conditions in bill of lading on *his* part.

That the said defendant overcharged the plaintiff- in the sum of \$100.00 as freight which was in excess of the public tariff on peaches from Greenwood, Arkansas, to the City of New York.

10 That by reason of the act and negligence on the part of the defendant company as aforesaid, the plaintiff- *has* sustained damages in the sum of \$563.50.

Wherefore the plaintiffs pray judgment in the sum of \$563.50, and for such other and further relief as the justice of the case may demand.

ROBERT A. ROWE,  
 ROWE & ROWE,  
*Attorneys for Plaintiffs.*

Endorsement appears on back as follows: "Filed July 18, 1910. J. R. Quesenbury, Clerk. By M. V. Hawkins, D. C."

Summons issued July 18, 1910.

Summons served and returned July 18, 1910.

11 In the Crawford Circuit Court.

No. 576.

ADAM MILLER et al., Plaintiffs,

vs.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,  
 Defendant.

*Answer.*

Comes the defendant — for its answer to complaint filed herein says:

Denies that the defendant is now and — at the several times herein-after set forth, a corporation organized under the laws of the State of Arkansas, and was at said times the owner, lessee, operator and manager of a line of railway from the town of Greenwood to the City of St. Louis, Mo., with some kind of an arrangement unknown to the plaintiffs to transport said peaches from there to the City of New York by railway and water and that said defendant company was a common carrier of goods and property.

Denies that the said plaintiff, Adam Miller, by and through his agent L. A. Taylor made a contract of purchase of the peaches in the hereinafter named car, on or about the 23rd day of July, 1907, from the other plaintiffs, above mentioned who were the owners of said peaches in said car, and agreed to pay therefor the sum of \$1.25

per crate on board the car at Greenwood, Ark.; but on account of the negligence of the defendant company in failing to take care of said peaches in transit, by icing the car and other acts of negligence hereinafter set forth, the peaches arrived in the City of New York in such a rotten and damaged condition and that on account of

12 such damaged condition of the peaches in the hereinafter named car, it was proposed by Miller, one of the plaintiffs herein that he would pay 65¢ per crate to Robert A. Rowe as agent and attorney for the plaintiffs who were the owners of the fruit in the following named cars, to-wit:

A. R. T. cars Nos. 10542 and 8787 and institute suit against the said defendant company and in consideration of said plaintiffs accepting said sum on the peaches in the condition that they were in, and that the plaintiff Adam Miller would give and divide with the other plaintiffs in this case one-half of the damages recovered and the plaintiff Adam Miller one-half, making the damages equally divided between Adam Miller and the other plaintiffs in this action.

Denies that the plaintiffs J. L. Wright, C. A. Young and Oliver Keap tendered and delivered to defendant company at its station at Greenwood, Ark., and that said defendant at the time and place accepted for shipment 490 six basket crates of peaches, which peaches were at the time tendered and delivered to defendant company and accepted by it sound, firm and in good shipping, salable and merchantable condition, which the defendant at the time undertook, assumed and agreed to load properly in its car, refrigerate said car sufficiently to prevent said peaches from decaying, to handle them with care, and made a way bill in which the said defendant company agreed to transport the same from Greenwood, Ark., to the city of New York without delay and then deliver the same in a marketable condition to the said Adam Miller, in consideration of which the plaintiffs Adam Miller, undertook to pay said defendant company the ordinary and reasonable charges for such services; denies that a copy of said way bill cannot be attached to the complaint herein for the reason that same is in the possession of the defendant company.

13 Denies that after said defendant loaded said peaches in its refrigerator A. R. T. Car No. 8787 and after said peaches had been loaded they appeared in said way bill from L. A. Taylor, Greenwood, Ark., to Adam Miller, New York.

Defendant denies that in the ordinary course of transit from Greenwood, Ark., to the City of New York said car of peaches should and would have arrived at said city of New York on the 28th day of July, 1907; denies that said peaches on the market in said city of New York on the 28th day of July, 1907, in a sound marketable condition were worth the sum of \$2.25 per crate or the total sum of \$1,102.50, but by reason of the defendant's negligence and carelessness in handling, moving and caring for said peaches, as herein-after set forth, said peaches became too hot and thereby wilted, shrunk and moulded, bruised and decayed so that they did not and would not bring the price of sound and marketable peaches on the market in said City, but on said market in said City were reasonably worth and sold for only the sum of \$539.00.

Defendant denies that said negligence and carelessness on its part consisted in this, to-wit:

1: Denies that defendant failed, refused and neglected to put in a sufficient amount of ice in said car before it was sent to Greenwood, and before it left Greenwood, Ark.; denies that it failed, neglected and refused to keep ice in said car sufficient to keep said peaches sound and firm until said car reached its destination; denies that it failed, refused and neglected to move said car of peaches out of the town of Greenwood, Ark. for more than 24 hours after said peaches were loaded in said car and ready for shipment.

2. Denies that it negligently failed, refused and neglected to load said peaches for shipment, but negligently allowed the same to remain on the platform of its said station at the town of

14 Greenwood, Ark. for more than 24 hours after said peaches had been tendered, delivered and accepted by said company for shipment.

3. Denies that said defendant company negligently delayed said car of peaches while in transit between Greenwood, Arkansas, and New York City for more than 8 days by reason of which plaintiff was damaged in the sum of \$—.

4. Denies that the defendant company negligently and carelessly loaded said peaches into a broken, defective and unsuitable car, that said defect consisted in this:

That the doors of said car were swollen and warped to such an extent that the same could not be closed or fastened; denies that the bunkers were too small to hold a sufficient amount of ice to keep the peaches cool enough to preserve them and the space above the peaches when loaded, too small to contain a sufficient amount of cold air to preserve them.

5. Denies that the said *plaintiff* negligently failed and refused to handle said car with care but handled same with such unnecessary force and violence that said peaches were mashed.

6. Denies that plaintiffs paid for and caused to be paid to the defendant company freight and refrigeration charges demanded by said defendant.

Defendant for its answer to the second paragraph of said complaint denies that the defendant overcharged plaintiff with the sum of \$100.00 as freight which was in excess of public tariff on peaches from Greenwood, Ark. to the City of New York, to amount of said sum.

Denies that by reason of acts and negligence on the part of defendant company as aforesaid, the plaintiffs have sustained

15 damages in the sum of \$563.50.

### Paragraph 3.

Defendant denies that during the transit of said car of Elberta peaches from Greenwood, Ark., to New York City, the defendant company under the common law owed the plaintiffs the duty to keep said car of peaches properly iced and refrigerated so as to keep the peaches sound, firm and prevent them from decaying and that

during transit the defendant company carelessly and negligently failed to keep said car iced so as to keep the peaches from decaying; denies that by reason of said negligence and failure on the part of defendant company the peaches in said car were heated, scalded, specked and rotten by reason thereof, to plaintiff's great damage in the sum of \$—.

4. Denies that after said car of peaches had been received and loaded into said car in a firm, sound and merchantable condition, a receipt or bill of lading was issued after said car was shipped and delivered to L. A. Taylor, agent of the plaintiff, Adam Miller, in which Greenwood, Arkansas, is mentioned as a shipping point and New York City as the place where the peaches were to be shipped and that Adam Miller then resided in New York City to whom the said receipts or bills of lading were made and by the said Adam Miller delivered to the delivering carrier and are now in the possession of the defendant company, copies of which have been requested from F. B. Anderson, Agent at Greenwood, and Lovick P. Miles the attorney of the defendant company, which they both failed to furnish and denies that for this reason plaintiffs are unable to file copy of the receipt or bill of lading with complaint.

16 Denies that what purports to be a copy of the bill of lading is filed marked Exhibit "A"; but plaintiff does not know whether a portion of it is a copy except what is filled in with pencil.

Defendant for its answer to the amendment to the original complaint herein says: denies that after said peaches were delivered to and accepted for shipment by the defendant and had been loaded into said car for shipment, and without further consideration passing and without special rate, the defendant issued and delivered a receipt or bill of lading therefor and in the name of L. A. Taylor, the agent of Adam Miller, consignee in the bill of lading, the name of each one of said parties appearing in the bill of lading that was delivered to L. A. Taylor; denies that the defendant used no other form of receipt or bill of lading and would not have given plaintiff, Adam Miller any other or a different form, which fact was well known to L. A. Taylor, his agent, at the time the bill of lading or receipt was issued, and that Adam Miller paid full rates upon said shipment.

Admits that said writing contained a clause providing that in case of damage to said fruit the consignee thereof should give notice to the delivering carrier of an intention to claim damages within thirty-six hours after notice of arrival of the freight at the place of delivery.

Denies that said clause was inserted therein without the consent of the plaintiff, who did not see the bill of lading until several days after it was issued as the plaintiff Adam Miller was in New York at the time, or of the owners of said fruit or of the consignee thereof; denies that said provision was unreasonable in this to-wit: That the consignee thereof lived in New York City and did not know at the time he learned of the damaged condition of the peaches whether



it was the fault of the consignor or shipper, or the fault of the defendant company so as to know whom to claim damages against and could not ascertain whose fault it was within thirty-six hours, or ascertain the damage and report the same in said time as the consignors and owners of the fruit resided at Greenwood, Ark., at the time the fruit was shipped and at the time it arrived in New York City; denies that it was more than thirty-six hours before this fruit in said car could be examined in the regular course of business and the loss discovered and report the same; denies that said car of peaches was delivered by the Pennsylvania R. R. Co., the terminus of which line of railway is at Jersey City, N. J., where its depot ground and railroad buildings are located from which place its cars were run on to the railroad flats or barges and towed over North River to the Dock of said railway company and no one is permitted on the cars, barges or dock except employees of said company; denies that the cars were unloaded while on the barges by the employees of the Pennsylvania Railroad Company, the delivering carrier who inspected and examined the peaches and who knew of their own knowledge the rotten condition they were in, as the tops and sides of the crates were open so that the peaches were plainly seen by the agents and employees of said company as they unloaded them and placed them on the dock and said refrigerator agents of said company saw and knew the damaged condition of the peaches; denies that the dock master whose name is unknown to plaintiffs was given notice by Adam Miller and in addition to this had actual knowledge of the damaged condition of the peaches. Denies that Adam Miller gave the notice within thirty-six hours. Denies that there is no agent of the delivering carrier designated in the bill of lading on whom notice of a claim of damage could be served; denies that the agents of said company were in the State of New Jersey. Denies that the defendant company knew that the peaches would rot in transit if they were not iced as they are perishable goods and in their custody and under their control and it was unnecessary for notice to be given them of the fact that they already knew and the defendant charged with knowledge of the damaged condition of the same. Defendant denies that it knew and had actual knowledge when it loaded said car of peaches at Greenwood, Ark., that said car was not properly and sufficiently iced so as to preserve and protect them from becoming too hot and decaying; denies that said defendant had actual knowledge at the time said peaches were loaded that they were perishable property and unless kept iced they would decay. Denies that it knew at the initial point as well as the point of delivery that they were rotten. Defendant denies that plaintiff has duly performed all the conditions in said bill of lading on his part.

Defendant further answering states that the car of peaches involved in this suit was shipped by L. A. Taylor at Greenwood, Ark., consigned to Adam Miller in New York City, N. Y.; that it was shipped under a special contract which provided that claims for damages must be reported by consignee in writing to the delivering line within 36 hours after the consignee has been notified of the

arrival of the freight at the place of delivery; that if said notice is not there given neither this company nor any of the connecting or intermediate carriers shall be liable; that the plaintiff wholly failed to comply with this part of the contract on his part and never at any time served notice in writing upon any agent of the delivering line of any claim for damages; that under the terms of said contract it was further provided: "That in the event of the loss  
19 of property under the provision of this agreement the value or cost of the same at the point of shipment shall govern the settlement."

Defendant further answering states that the alleged cause of action set out in paragraph No. 5 herein and which — a new and distinct basis for a cause of action from the original complaint herein was not filed in this court until after the motion to make more definite and certain was filed and sustained by this court, to-wit: on the 2nd day of December, 1912, more than five years after the shipments herein involved are alleged to have occurred, and therefore, was barred by the statute of limitations in such cases made and provided, and the defendant pleads the said statute of limitations as a bar to plaintiff's right to recover herein; that the complaint herein was not filed until three years after the cause of action accrued, and defendant pleads said three years' statute of limitations as a bar to a recovery herein.

Defendant further answering states that the shipment involved herein was an interstate shipment, as alleged in the complaint, and that the complaint herein was not filed within two years from the accrual of the cause of action; that said shipment was governed by the rules of the Interstate Commerce Commission which requires that all complaints for the recovery of damages must be filed within two years from the time the cause of action accrued.

Wherefore, having fully answered, defendant asks that it be discharged hence with all its costs in this behalf laid out and expended.

ST. LOUIS, IRON MOUNTAIN &  
SOUTHERN RAILWAY CO.,

(Signed)

By THOS. B. PRYOR, *Attorney.*

Endorsed on back as follows: Filed June 18, 1913. A. Hays, Clerk."

191 $\frac{1}{2}$ -24 The amounts claimed in the other nine Complaints are as follows:

- (2) \$661.50.
- (3) \$735.00.
- (4) \$\_\_\_\_\_.
- (5) \$808.50.
- (6) \$612.50.
- (7) \$708.75.
- (8) \$735.00.
- (9) \$735.00.
- (10) \$708.75.

The material parts of the Bills of Lading attached to these complaints are as follows:



24½—41

Form 1132 M.

St. Louis, Iron Mountain &amp; Southern Railway Co.

Leased, Operated and Independent Lines.

Cnt. Division of I. M. S. Railway.

7/21, 1907.

Received from L. A. Taylor the following property, in apparent good order, marked and numbered as per margin, to be transported from Greenwood, Ark., to New York, N. Y., and delivered to the consignee, or a connecting common carrier.

Consigned to Adam Miller at New York, N. Y.

Marked.	List of Articles.	Weight.
		Daly. Ms.
9737.	490—6 Bskt. Pchs. ....	20,000
A. R. T.	O. R. S. L. & C. Refg. ....	22,000

Reice Ft. Smith, Little Rock, and every twenty fours — thereafter.

41½—58

Form 1132 M.

St. Louis, Iron Mountain &amp; Southern Railway Co.

Leased, Operated and Independent Lines.

Cnt. Division of I. M. S. Railway.

7/20, 1907.

Received from L. A. Taylor the following property, in apparent good order, marked and numbered as per margin, to be transported from Greenwood, Ark., to St. Louis, Mo., and delivered to the consignee, or a connecting common carrier.

Consigned to Adam Miller at New York, c/o Pier 29, P. R. R. Co.

Marked.	List of Articles.	Weight.
10640.	490—6 Bskts. Pchs. ....	20,000
A. R. T.	O. R. S. L. & C. Refr. ....	22,000
L. W. Rhodes, Agt.	Detention, \$10.00.	

Reice Ft. Smith and Little Rock and every twenty four hours thereafter.

58½—74

Form 1132 M.

St. Louis, Iron Mountain &amp; Southern Railway Co.

Leased, Operated and Independent Lines.

Cnt. Division of I. M. S. Railway.

7/18, 1907.

Received from L. A. Taylor the following property, in apparent good order, marked and numbered as per margin, to be transported from Greenwood, Ark., to St. Louis, Mo., and delivered to the consignee, or a connecting common carrier.

Consigned to Adam Miller at New York.

Marked.	List of Articles.	Weight.
10052.	490—6 Bskt. Pch.....	20,000
A. R. T.	O. R. S. L. & C. Refr.....	22,000
L. W. Rhodes, Agt.		

Reice Ft. Smith, Little Rock and every twenty four hours thereafter.

74½—94

Form 1132 M.

St. Louis, Iron Mountain &amp; Southern Railway Co.

Leased, Operated and Independent Lines.

——— Division of ——— Railway.

7/23, 1907.

Received from L. A. Taylor the following property, in apparent good order, marked and numbered as per margin, to be transported from Greenwood, Ark., to Adam Miller and delivered to the consignee, or a connecting common carrier.

Consigned to Adam Miller at New York, N. Y.

Route, I. M. S. c/o A. R. T. car No. 9478.

Marked.	List of Articles.	Weight.
O. B.	490—6 Bskt. Pchs.....	20,000
S. L. C.		

Reice Ft. Smith, L. Rock and every 24 hours thereafter.

94½—113

Form 1132 M.

St. Louis, Iron Mountain &amp; Southern Railway Co.

Leased, Operated and Independent Lines.

Cnt. Division of I. M. S. Railway.

7/23, 1907.

Received from L. A. Taylor the following property, in apparent good order, marked and numbered as per margin, to be transported from Greenwood to St. Louis and delivered to the consignee, or a connecting common carrier.

Consigned to Adam Miller at New York, Penn. Dely., Pi-r 29.

Marked.	List of Articles.	Weight.
8711.	490—6 Bskt. Pchs.....	20,000
A. R. T.	O. R. S. L. & C. Refr.....	22,000
L. W. Rhodes, Agt.		

Reice Ft. Smith, Little Rock and every twenty four hours thereafter.

113½—132

Form 1132 M.

St. Louis, Iron Mountain &amp; Southern Railway Co.

Leased, Operated and Independent Lines.

Cent. Division of I. M. S. Railway.

7/19, 1907.

Received from L. A. Taylor the following property, in apparent good order, marked and numbered as per margin, to be transported from Greenwood, Ark., to St. Louis, Mo., and delivered to the consignee, or a connecting common carrier.

Consigned to Adam Miller at New York, N. Y.

Marked.	List of Articles.	Weight.
10542.	525—6 Bskt. Pchs.....	20,000
A. R. T.	O. R. S. L. & C. Refr.....	22,000
L. W. Rhodes, Agt.		

Reice Ft. Smith, Little Rock and every 24 hrs. thereafter.

132½-151

Form 1132 M.

St. Louis, Iron Mountain &amp; Southern Railway Co.

Leased, Operated and Independent Lines.

Cent. Division of I. M. S. Railway.

7/21, 1907.

Received from L. A. Taylor the following property, in apparent good order, marked and numbered as per margin, to be transported from Greenwood, Ark., to St. Louis and delivered to the consignee, or a connecting common carrier.

Consigned to Adam Miller at New York, Penn. Dely.

Marked.	List of Articles.	Weight.
10756	490—6 Bsk. Pchs.....	20,000
A. R. T.	O. R. S. L. & C. Refr.....	22,000
L. W. Rhodes, Agt.		

Reice Ft. Smith, Little Rock and every twenty four hours thereafter.

151½-169

Form 1132 M.

St. Louis, Iron Mountain &amp; Southern Railway Co.

Leased, Operated and Independent Lines.

Cent. Division of I. M. S. Railway.

7/20, 1907.

Received from L. A. Taylor the following property, in apparent good order, marked and numbered as per margin, to be transported from Greenwood, Ark., to St. Louis, Mo., and delivered to the consignee, or a connecting common carrier.

Consigned to Adam Miller at New York, Pier 29, P. R. R. Co.

Marked.	List of Articles.	Weight.
8683.	490—6 Bsk. Pchs.....	20,000
A. R. T.	O. R. S. L. & C. Refr.....	22,000
L. W. Rhodes, Agt.	Detention, \$10.00.	

Reice Ft. Smith, Little Rock and every twenty four hours thereafter.

169½-183

Form 1132.

The Missouri Pacific Railway Company.

Leased, Operated and Independent Lines.

Cnt. Division of I. M. S. Railway.

7/17, 1907.

Received from A. L. Taylor the following property, in apparent good order, marked and numbered as per margin, to be transported from Greenwood, Ark., to St. Louis, Mo., and delivered to the consignee, or a connecting common carrier.

Consigned to Adam Miller at New York.

Marked.	List of Articles.	Weight.
10875.	525—6 Baks.....	20,000
A. R. T.	O. R. S. L. & C. Refr.....	22,000
L. W. Rhodes, Agt.		

Reice Ft. Smith, Little Rock and every twenty four hours thereafter.

184 &amp; 185

ADAM MILLER et al., Plaintiffs,

vs.

St. L., I. M. &amp; S. RY. Co., Defendant.

*Order Consolidating Cases.*

On this day it is by the court ordered that cases from No. 39 to No. 48 of the law docket of the present term be and the same are hereby consolidated, and this case is continued and set for trial on Wednesday of the second week of the next term.

Law Record "I," page 228.

\* \* \* \* \*

186

*Filing Demurrer.*

In the Crawford Circuit Court.

ADAM MILLER, Plaintiff,

vs.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,  
Defendant.

June 26, 1911.

On this day defendant files demurrer.

Law Record "I," page 265.

*Cause Continued.*

ADAM MILLER, Plaintiff,  
vs.  
ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,  
Defendant.

On this day this cause is continued by consent and set for Wednesday of the second week.

Law Record "I," page 284.

187-189      *Motion to Dismiss Overruled.*

In the Crawford Circuit Court.

ADAM MILLER, Plaintiff,  
vs.  
ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,  
Defendant.

November 29, 1911.

On this day motion to dismiss cause for non-compliance with the orders of the court heretofore made, is overruled and defendant excepts. Demurrer to complaint is overruled and defendant excepts, and case set down for next Tuesday.

Law Record "I," page 315.

\* \* \* \* \*

190-192      *Death of Adam Miller Suggested & Admitted & Revived.*

In the Crawford Circuit Court.

ADAM MILLER, Plaintiff,  
vs.  
ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,  
Defendant.

June 26, 1912.

On this day the death of Adam Miller is suggested and admitted, and by consent the cause is revived as to Adam Miller in the name of C. A. Starbird who is appointed special administrator, and by consent cause is continued until next term and set for Wednesday of the second week.

Law Record "I," page 355.

*Motion to Strike Part of Complaint and Files Answer.*

ADAM MILLER, Plaintiff,

VS.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,  
Defendant.

June 18, 1913.

On this day defendant files motion to strike out a part of the complaint and also files answer.

Law Record "I," page 426.

193

*Order of Consolidation.*

In the Crawford Circuit Court.

ADAM MILLER et al., Plaintiff,

VS.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,  
Defendant.

Ten Cases Consolidated.

*Affidavit and Testimony of Robert A. Rowe in Support of Motion to Review and Set Aside the Order Suppressing the Deposition of Adam Miller.*

Comes Robert A. Rowe, and states on oath that Adam Miller did not fail and refuse to answer several material questions propounded in cross-interrogatories numbered 12, 13, 14, 15, 16 and 17, but that he answered all of them except 17, which shows that it is not to be answered only in case the answer to a former question should be that he did not give a receipt to the Pennsylvania Railroad Co. or order to the same to turn certain cars over to the Merchants Refrigerating Co. He answered that he did give the order, therefore question 17 required no answer. I refer to the cross interrogatories and his answers thereto and make them a part of this affidavit.

The cross interrogatories were attached to the direct interrogatories to be answered by the several witnesses named therein and I refer to the interrogatories and cross interrogatories and make them a part of this affidavit.

The deposition never has been changed since it was filed in this court the first time. There was added to the deposition since it was first filed an amended caption and certificate by the officer,  
194 Leo Levy, who took the deposition, to make it conform to the facts and the deposition after adding the amended caption and certificate was mailed by the, as I verily believe, to the Circuit Clerk of this court.

Answer to Interrogatory 15 was not prepared for counsel for plaintiff and forwarded to witness Miller for use. Counsel for plaintiff did not prepare any answers for him or correspond with him as to what he should testify to in this case. When he gave his deposition I was in Arkansas and he was in New York City.

Since the court has suppressed the deposition of Adam Miller he has died and the facts embraced in his deposition cannot be proven by any other witness and he was a non-resident of the State at the time his deposition was taken, and the defendant's counsel had an opportunity to cross examine him, his depositions being taken upon interrogatories and notice of the filing the same in the Clerk's office and the defendant's counsel thereupon filed cross interrogatories to be propounded to Adam Miller which was done and the interrogatories and cross interrogatories answered by him.

(Signed)

ROBT. A. ROWE.

Subscribed and sworn to before me this 2nd day of December, 1912.

A. HAYS, *Clerk*,  
By C. M. BLEDSOE, *D. C.*

195 *Motion to Reinstate Deposition of Adam Miller Sustained.*

Crawford Circuit Court.

ADAM MILLER, Plaintiff,

vs.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,  
Defendant.

Motion to reinstate deposition of Adam Miller is sustained and depositions reinstated. Defendant excepts. Sixty days to file answer. Cause continued and set for Wednesday of the second week. Law Record "I," page 405.

196 *Order of Continuance.*

In the Crawford Circuit Court.

ADAM MILLER, Plaintiff,

vs.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,  
Defendant.

June 20, 1913.

Continued by consent and set for second Wednesday of next term. Agreed no continuance will be asked. Law Record "I," page 436.



*Jury Waived and Cause Set.*

ADAM MILLER, Plaintiff,

vs.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,  
Defendant.

November 26, 1913.

On this day jury waived and this cause set for second Wednesday  
in February, 1914.

Law Record "I," page 504.

197      *Motion to Strike Certain Parties Plaintiff.*

In the Crawford Circuit Court.

C. A. STARBIRD, Special Admr. of Adam Miller, Deceased, Plaintiff,

vs.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,  
Defendant.

February 11, 1914.

On this day the defendant files motion to strike the names of cer-  
tain parties plaintiff from complaint.

Motion sustained; parties named saved exceptions.

Law Record "I," page 527.

## 198      In the Crawford Circuit Court.

ADAM MILLER, Plaintiff,

vs.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,  
Defendant.*Bill of Exceptions.*

Now on this 11th day of February, 1914, the above entitled cause  
coming on for trial before the Honorable Jephtha H. Evans, Judge  
of the Crawford Circuit Court, came the plaintiff by *their* attorneys  
Robt. A. Rowe, and also in person came the defendant by its attor-  
ney Thos. B. Pryor, Esquire, and both parties announcing ready  
for trial, and both parties agreeing in open court to waive a jury,  
and submit the cause to the court sitting as a jury.

Whereupon, the plaintiff, in order to main- the issues on his part,  
introduced the following evidence, to-wit:

*Plaintiff's Evidence.*

The Deposition of Adam Miller, Taken on the 9th Day of June, 1911, Before Leo Levy, a Notary Public in the City of New York.

(Here Clerk will copy deposition of Adam Miller.)

199

*Deposition of Adam Miller.*

The deposition of ADAM MILLER, Commission Merchant, 2268 Seventh Avenue, New York City, N. Y., was read in evidence on behalf of the plaintiff, as follows:

Int. No. 1. State your name, age, place of residence and occupation?

Ans. to Int. No. 1. My name is Adam Miller. I am forty-three years old and reside at No. 2268 Seventh Avenue, New York City; I am a commission merchant and a dealer in fruit and produce.

Int. No. 2. Do you know Adam Miller and was he doing business at 328 Washington Street in the City of New York during the months of July and August, 1907, if so, was he a commission merchant, and how long has he been in the business?

Ans. to Int. No. 2. In July and August, 1907, I was doing business at 328 Washington Street in the City of New York as a commission merchant and have been in business about fifteen years.

Int. No. 3. State whether Adam Miller received and sold the following car of Elberta peaches, to-wit: A. R. T. Car No. 8787, and on whose account?

Ans. to Int. No. 3. I received and sold the car of Elberta peaches, to-wit: A. R. T. No. 8787, on my own account.

Int. No. 4. If you say such a car of peaches was received and sold on account of Adam Miller, then state what day said car arrived in New York City, if you know?

Ans. to Int. No. 4. A. R. T. car No. 8787 arrived in Jersey City on August 1, 1907.

Int. No. 5. If you say Adam Miller received and sold  
200 such a car of peaches on his account, state how much he received for said car?

Ans. to Int. No. 5. I received for the peaches in that car \$539.00. This car contained 490 crates of peaches.

Int. No. 6. If you say Adam Miller received said peaches and that they were sold on account of Adam Miller, if you have the account sales for said car attach the same to your deposition and mark exhibit "A"?

Ans. to Int. No. 6. I have no account of sales for said car and cannot give it to you.

Int. No. 7. State whether or not you were acquainted with the market price of Elberta peaches in the City of New York in July and August, 1907?

Ans. to Int. No. 7. I was acquainted with the market price of Elberta peaches in New York City in July and August of 1907.

Int. No. 8. If you say you were acquainted with the price of Elberta peaches at the time and place inquired about, then state what was the market value of peaches in car A. R. T. No. 8787, on the market of said city at the time they were sold in July and August in 1907, and also their market value on the day the peaches should have arrived in New York City, if they had not been delayed, in transit?

Ans. to Int. No. 8. The market value of Elberta peaches in the New York City market when they were sold was \$2.25 per crate. Their market value on the day when they should have arrived was \$2.25 per crate.

Int. No. 9. If you say you know the market price or value  
201 of peaches during the months of July and August, 1907, and also the day of sale as propounded in the last question and you say you know the price at which they were sold, then state whether or not said price was the highest market price for which they could be sold on the market in the condition they were in at the time of their arrival?

Ans. to Int. No. 9. It was.

Int. No. 10. If you say Adam Miller received and sold the peaches inquired about, then state if you saw and examined them in the car on their arrival in New York City, then state what condition the peaches were in as to being rotten, specked, bruised, mashed or mouldy or unmarketable peaches?

Ans. to Int. No. 10. I did not go into the car. I saw the peaches immediately after they were unloaded from the car. More than one half of these peaches were unmarketable, specked, mashed and mouldy. Some of them were entirely rotten. When taken off the car the peaches were leaking in more than a third of the crates. Fully fifty per cent were absolutely unmarketable. The rest of the peaches when they came out of the car were warm and dry.

Int. No. 11. If you state that you saw such a car of peaches on arrival of same in New York City, or after their arrival and examined them, state what if anything, you observed as to the condition of car, car doors, drain pipes, ice in bunkers of car and temperature of same?

Ans. to Int. No. 11. I did not go into the car. The Pennsylvania Railroad delivered the car at the Merchants Refrigerating Company's warehouse in Jersey City. The crates of peaches were taken

off of the car by the railroad company's employees and put  
202 into the refrigerator as fast as they came off of the car. I went over at once and had the peaches stored and the rotten ones thrown out and the sound ones re-packed in crates and the crates of sound peaches were then put into the cars. I did not see the car doors nor the drain pipes nor the ice bunkers. When the peaches were put into the refrigerator they were warm and dry.

Int. No. 12. If you state you saw and examined said car of peaches contained therein and the condition of the bracing, state the condition of the bracing?

Ans. to Int. No. 12. I did not see the bracing.

Int. No. 13. State if you know who paid the freight on the car inquired about and the amount of freight paid and attach the receipt if you have the same and mark the receipt exhibit "B"?

Ans. to Int. No. 13. I paid the freight on this car. The amount was \$291.70. I have not the freight receipt which, I think, was forwarded to Mr. Robert A. Rowe.

Int. No. 14. If you say the peaches inquired about were received and the same were specked, rotten, mouldy or bruised then state whether the condition was uniform throughout the car and if not state what part of the car was such condition the worst?

Ans. to Int. No. 14. The condition of the peaches was not uniform through the car. The two top layers were about 80% rotten and worthless. The third layer was about 60% wholly bad. The lower layers run much better. The top three layers were the worst.

Int. No. 15. If you say such fruit arrived in a specked, rotten, bruised and mouldy condition then state what proportion or per cent of the fruit was in said bad condition?

Ans. to Int. No. 15. More than fifty (50%) per cent.

Int. No. 16. State if you know when the above mentioned car was shipped and when it was due to arrive in New York City, and the market price of peaches in car when it was due to arrive and also the market price of the peaches in above mentioned car at their arrival if they had been in sound, firm and marketable condition?

Ans. to Int. No. 16. This car was shipped in the evening of July 23, 1907. It was due to arrive in New York four and a half days after that; that would make it the morning of July 28, 1907. On July 28th the market price was \$2.25 per crate, if sound and merchantable.

Int. No. 17. State whether you or any of your employees told any of employees of delivering carrier of the damaged condition of peaches in said car and whether or not employees of said railroad company went into the car and inspected the peaches and if they did not go into the car did they unload or see the peaches unloaded or see them after they were unloaded and knew of the damaged condition of the peaches, giving name of the employee if you know and the position he holds with the company?

Ans. to Int. No. 17. I do not know.

Int. No. 18. State if you know whether the railroad company at that end of the line had an employee to inspect said car of peaches and knew of the condition in which the car arrived?

Ans. to Int. No. 18. I do not know.

Int. No. 19. Give fully and details the distance from Miller's place of business to the delivering carrier's railroad and if there is any river between his place of business and railroad tell what river and the width and describe fully who unloaded the car of peaches and how and where it was unloaded?

Ans. to Int. No. 19. The Merchants Refrigerating Company has a switch or side track running to its doors. The cars run from there to the river and at the river they are run on board a lighter. It is the Hudson river and is about a mile wide. The peaches were

unloaded by the railroad company's employees at the Merchants Refrigerating Company's plant.

Int. No. 20. State whether or not if you know that thirty-six hours after notice of the arrival of said car is a reasonable or unreasonable *provision* length of time to give *tax* notice to the delivering carrier of a claim of damages giving all of the circumstances and the manner of unloading and marketing Elberta peaches at that end of the line?

Ans. to Int. No. 20. The car arrived at the end of the road in Jersey City. It was then unloaded by the railroad company's employees and the peaches taken into the Merchants Refrigerating Company. I was then notified of its arrival and went over to the Merchants Refrigerating Company. I put a lot of men at work sorting the peaches, throwing out the rotten and unmarketable ones and re-packing the sound ones in crates. Several cars arrived at the same time. It would take from two to four days to get the sound peaches separated and re-crated and then it would take another day to put them on board the cars and get them over to  
205 Pier 29 and sold and it would be another day before the reports of sale could be made up. It would take nearly four days anyway to find out how many crates of good peaches there were. I went over to the Merchants Refrigerating Company.

206

*Deposition of Adam Miller.*

The deposition of ADAM MILLER, Commission Merchant, 2268 Seventh Avenue, New York City, was read in evidence in behalf of the plaintiff as follows:

Int. No. 1. State your name, age, place of residence and occupation?

Ans. to Int. No. 1. My name is Adam Miller. I am forty-three years old and reside at No. 2268 Seventh Avenue, New York City. I am a commission merchant and a dealer in fruit and produce.

Int. No. 2. Do you know Adam Miller and was he doing business at 328 Washington Street in the City of New York during the months of July and August, 1907, if so, was he a commission merchant, and how long had he been in the business?

Ans. to Int. No. 2. In July and August, 1907, I was doing business at 328 Washington Street in the City of New York as a commission merchant and have been in business about fifteen years.

Int. No. 3. State whether Adam Miller received and sold the following car of Elberta peaches, to-wit: A. R. T. Car No. 9737, and on whose account?

Ans. to Int. No. 3. I received and sold the car of Elberta peaches, to-wit: A. R. T. Car 9737 on my own account.

Int. No. 4. If you say such a car of peaches was received and sold on account of Adam Miller, then state what day said car arrived in New York City, if you know?

Ans. to Int. No. 4. A. R. T. Car 9737 arrived in Jersey City on August 7, 1907.

Int. No. 5. If you say Adam Miller received and sold  
207 such a car of peaches on his account, state how much he received for said car?

Ans. to Int. No. 5. I received for the peaches in that car \$441.00. This car contained 490 crates of peaches.

Int. No. 6. If you say Adam Miller received said peaches and that they were sold on account of Adam Miller, if you have the account sales for said car attach the same to your deposition and mark exhibit "A"?

Ans. to Int. No. 6. I have no account of sales for said car and cannot give it to you.

Int. No. 7. State whether or not you were acquainted with the market price of Elberta peaches in the City of New York in July and August, 1907?

Ans. to Int. No. 7. I was acquainted with the market price of Elberta peaches in New York City in July and August of 1907.

Int. No. 8. If you say you were acquainted with the price of Elberta peaches at the time and place inquired about, then state what was the market value of peaches in car A. R. T. No. 9737 on the market of said city at the time they were sold in July and August in 1907, and also their market value on the day the peaches should have arrived in New York City if they had not been delayed, in transit?

Ans. to Int. No. 8. The market value of Elberta peaches in the New York City market when they were sold was \$2.25 per crate. Their market value on the day when they should have arrived was \$2.25 per crate.

Int. No. 9. If you say you know the market price or value  
208 of peaches during the months of July and August, 1907, and also the day of sale as propounded in the last question and you say you know the price at which they were sold, then state whether or not said price was the highest market price for which they could be sold on the market in the condition they were in at the time of their arrival?

Ans. to Int. No. 9. It was.

Int. No. 10. If you say Adam Miller received and sold the peaches inquired about then state if you saw and examined them in the car on their arrival in New York City, then state what condition the peaches were in as to being rotten, specked, bruised, mashed or mouldy or unmarketable peaches?

Ans. to Int. No. 10. I did not go into the car. I saw the peaches immediately after they were unloaded from the car. Fully 60% of these peaches were rotten, specked, unmarketable and mouldy. The peaches were leaky in more than a third of the crates when they came out of the car. All of the sound peaches were warm and dry.

Int. No. 11. If you state that you saw such a car of peaches on arrival of same in New York, or after their arrival and examined them, state what if anything, you observed as to the condition of car, car doors, drain pipes, ice in bunkers of car and temperature of same?



Ans. to Int. No. 11. I did not go into the car. The Pennsylvania railroad delivered the car at the Merchants Refrigerating Company's warehouse in Jersey City. The crates of peaches were taken off of the car by the railroad company's employees and put into the refrigerator as fast as they came off of the car. I went over at once

and had the peaches sorted and rotten ones thrown out and  
209 the sound ones re-packed in crates and the crates of sound peaches were then put into the cars. I did not see the car doors nor the drain pipes nor the ice bunkers. When the peaches were put into the refrigerator they were warm and dry.

Int. No. 12. If you say you saw and examined said car of peaches contained therein and the condition of the bracing, state the condition of the bracing?

Ans. to Int. No. 12. I did not see the bracing.

Int. No. 13. State if you know who paid the freight on the car inquired about and the amount of freight paid and attach the receipt if you have the same and mark the receipt exhibit "B"?

Ans. to Int. No. 13. I paid the freight on this car. The amount was \$291.70. I have not the freight receipt which, I think, was forwarded to Mr. Robert A. Rowe.

Int. No. 14. If you say the peaches inquired about were received and the same were specked, rotten, mouldy or bruised then state whether the condition was uniform throughout the car and if not state what part of the car was such condition the worst?

Ans. to Int. No. 14. The condition of the peaches was not uniform through the car. The two top layers were about 80% rotten and worthless. The third layer was about 60% wholly bad. The lower layers run much better. The top three layers were the worst. There were a lot of bad peaches scattered all through the car.

Int. No. 15. If you say such fruit arrived in a specked,  
210 rotten, bruised and mouldy condition then state what proportion or per cent of the fruit was in said bad condition?

Ans. to Int. No. 15. More than sixty per cent.

Int. No. 16. State if you know when the above mentioned car was shipped and when it was due to arrive in New York City and the market price of peaches in car when it was due to arrive and also the market price of the peaches in above mentioned car at their arrival if they had been in sound, firm and marketable condition?

Ans. to Int. No. 16. This car was shipped in the evening of July 21, 1907. It was due to arrive in New York four and a half days after that; that would make it the morning of the 26th of July, 1907. On July 26th, the market price was \$2.25 per crate, if sound and merchantable.

Int. No. 17. State whether you or any of your employees told any of the employees of delivering carrier of the damaged condition of peaches in said car and whether or not employees of said railroad company went into the car and inspected the peaches and if they did not go into the car did they unload or see the peaches unloaded or see them after they were unloaded and knew of the damaged

condition of the peaches, giving name of the employees if you know and the position he holds with the company?

Ans. to Int. No. 17. I do not know.

Int. No. 18. State if you know whether the railroad company at that end of the line had an employee to inspect said car of peaches and knew of the condition in which the car arrived?

Ans. to Int. No. 18. I do not know.

211 Int. No. 19. Give fully and details the distance from Adam Miller's place of business to the delivering carrier's railroad and if there is any river between his place of business and railroad tell what river and the width and describe fully who unloaded the car of peaches and how and where it was unloaded?

Ans. to Int. No. 19. The Merchants Refrigerating Company has a switch or side track running to its doors. The cars run from there to the river and at the river they are run on board a lighter. It is the Hudson River and is about a mile wide. The peaches were unloaded by the railroad company's employees at the Merchants Refrigerating Company's plant.

Int. No. 20. State whether or not if you know that thirty-six hours after notice of the arrival of said car is a reasonable or unreasonable *provision* length of time to give notice to the delivering carrier of a claim of damages giving all of the circumstances and the manner of unloading and marketing Elberta peaches at that end of the line?

Ans. to Int. No. 20. The car arrived at the end of the road in Jersey City. It was then unloaded by the railroad company's employees and the peaches taken into the Merchants Refrigerating Company. I was then notified of its arrival and went over to the Merchants Refrigerating Company. I put a lot of men at work sorting the peaches, throwing out the rotten and unmarketable ones and re-packing the sound ones in crates. Several cars arrived at the same time. It would take from two to four days to get the sound peaches separated and re-crated and then it would take another day to put them on board the cars and get them over to Pier 29

212 and sold and it would be another day before the reports of sale could be made up. It would take nearly four days anyway to find out how many crates of good peaches there were. I went over to the Merchants Refrigerating Company.

213 *Deposition of Adam Miller.*

The deposition of ADAM MILLER, No. 2268 — Avenue, New York City, was read in evidence on behalf of the plaintiff as follows:

Int. No. 1. State your name, age, place of residence and occupation?

Ans. to Int. No. 1. My name is Adam Miller. I am forty-three years old and reside at No. 2268 Seventh Avenue, New York City; I am a commission merchant and a dealer in fruit and produce.

Int. No. 2. Do you know Adam Miller and was he doing business at 328 Washington Street in the City of New York during the months



of July and August, 1907, if so, was he a commission merchant, and how long has he been in the business?

Ans. to Int. No. 2. In July and August, 1907, I was doing business at 328 Washington Street in the City of New York as a commission merchant and have been in business about fifteen years.

Int. No. 3. State whether Adam Miller received and sold the following car of Elberta peaches, to-wit: A. R. T. Car No. 10640 and on whose account?

Ans. to Int. No. 3. I received and sold the car of Elberta peaches, to-wit: A. R. T. Car No. 10640 on my own account.

Int. No. 4. If you say such a car of peaches was received and sold on account of Adam Miller, then state what day said car arrived in New York if you know?

Ans. to Int. No. 4. A. R. T. Car No. 10640 arrived in New York on July 31, 1907.

214 Int. No. 5. If you say Adam Miller received and sold such a car of peaches on his account, state how much he received for said car?

Ans. to Int. No. 5. I received for the peaches in that car \$367.50. This car contained 490 crates of peaches.

Int. No. 6. If you say Adam Miller received said peaches and that they were sold on account of Adam Miller, if you have the account sales for said car attach the same to your deposition and mark exhibit "A".

Ans. to Int. No. 6. I have no account of sales for said car and cannot give it to you.

Int. No. 7. State whether or not you were acquainted with the market price of Elberta peaches in the City of New York in July and August, 1907?

Ans. to Int. No. 7. I was acquainted with the market price of Elberta peaches in New York in July and August, 1907.

Int. No. 8. If you say you were acquainted with the price of Elberta peaches at the time and place inquired about, then state what was the market value of peaches in car A. R. T. No. 10640 on the market of said city at the time they were sold in July and August in 1907, and also their market value on the day the peaches should have arrived in New York City if they had not been delayed, in transit?

Ans. to Int. No. 8. The market value of Elberta peaches in the New York City market when they were sold was \$2.25 per crate. Their market value on the day they should have arrived was \$2.25 per crate.

Int. No. 9. If you say you know the market price or value of peaches during the months of July and August, 1907, and  
215 also the day of sale as propounded in the last question and you say you know the price at which they were sold, then state whether or not said price was the highest market price for which they could be sold on the market in the condition they were in at the time of their arrival?

Ans. to Int. No. 9. It was.

Int. No. 10. If you say Adam Miller received and sold the peaches

inquired about then state if you saw and examined them in the car on their arrival in New York City, then state what condition the peaches were in as to being rotten, specked, bruised, mashed or mouldy or unmarketable peaches?

Ans. to Int. No. 10. I did not go into the car. I saw them as soon as they were unloaded. Fully 70% of the peaches were unmarketable, rotten, specked, mashed, bruised and mouldy. When they were put on the dock they were leaking in more than half of the crates. The sound peaches were warm and dry. The peaches in that car were warm and dry.

Int. No. 11. If you state that you saw such a car of peaches on arrival of same in New York City, or after their arrival and examined them state what if anything, you observed as to the condition of car, car doors, drain pipes, ice in bunkers or car and temperature of same?

Ans. to Int. No. 11. I did not go into the car. The Pennsylvania railroad, which owns the dock, do not permit me to go either on board the lighter or into the car. I did not see the car doors nor drain pipes nor the ice bunkers. When the peaches came out of the car they were warm and dry except the wetness from leakage.

216 Int. No. 12. If you state you saw and examined said car of peaches contained therein and the condition of the bracing, state the condition of the bracing?

Ans. to Int. No. 12. I did not see the bracing.

Int. No. 13. State if you know who paid the freight on the car inquired about and the amount of freight paid and attach the receipt if you have the same and mark the receipt exhibit "B"?

Ans. to Int. No. 13. I paid the freight on this car. The amount was \$—, I have not the freight receipt which, I think, was forwarded to Mr. Robert A. Rowe.

Int. No. 14. If you say the peaches inquired about were received and the same were specked, rotten, mouldy or bruised then state whether the condition was uniform throughout the car and if not state what part of the car was such condition the worst?

Ans. to Int. No. 14. The condition of the peaches was not uniform through the car. The two top layers were about 80% rotten and worthless. The third layer was about 60% wholly bad. The lower layers run much better. The top three layers were the worst. There were a lot of bad peaches scattered all through the car.

Int. No. 15. If you say such fruit arrived in a specked, rotten, bruised and mouldy condition then state what proportion or per cent of the fruit was in said bad condition?

Ans. to Int. No. 15. More than 70%.

Int. No. 16. State if you know when the above mentioned car was shipped and when it was due to arrive in New York City  
217 and the market price of peaches in car when it was due to arrive and also the market price of the peaches in above mentioned car at their arrival if they had been sound, firm and marketable condition?

Ans. to Int. No. 16. This car was shipped in the evening of July 20, 1907. It was due to arrive in New York four and a half days

after that; that would make it the morning of July 25, 1907. On July 25th, the market price was \$2.25 per crate, if sound and merchantable.

Int. No. 17. State whether you or any of your employees told any of employees of delivering carrier of the damaged condition of peaches in said car and whether or not employees of said railroad company went into the car and inspected the peaches and if they did not go into the car did they unload or see the peaches unloaded or see them after they were unloaded and knew of the damaged condition of the peaches, giving name of the employee if you know and the position he holds with the company?

Ans. to Int. No. 17. I called the attention of the dock foreman to the bad peaches and told him they were not iced and had gone bad. I don't know the dock foreman's name. He is in the employ of the Pennsylvania Railroad, which owns the dock where the peaches were unloaded from the car which was lightered from Jersey City to New York. I don't know his name. He looked at them and went away.

Int. No. 18. State if you know whether the railroad company at that end of the line had an employee to inspect said car of peaches and knew of the condition in which the car arrived?

218 Ans. to Int. No. 18. The railroad company has a man at the dock who inspects the peaches as they come on the dock off of the cars and see the condition which they arrive in.

Int. No. 19. Give fully and details the distance from Adam Miller's place of business to the delivering carrier's railroad and if there is any river between his place of business and railroad tell what river and the width and describe fully who unloaded the car of peaches and how and where it was unloaded?

Ans. to Int. No. 19. The cars arrived at Jersey City by rail from Arkansas. At Jersey City they run the cars on to a lighter and then are towed to Pier 29, North River, New York, which is at the foot of North Moore Street, where they are unloaded. This dock is five city blocks from my place of business and that means about a quarter of a mile. They are towed across the Hudson River, which is about a mile wide. The peaches are unloaded from the cars by employees of the railroad and placed upon the dock at Pier 29. I have nothing to do with this unloading and they do not let me go through to see it done. It is all done by the railroad company.

Int. No. 20. State whether or not if you know that thirty-six hours after notice of the arrival of said car is a reasonable or unreasonable provision length of time to give notice to the delivering carrier of a claim of damages giving all of the circumstances and the manner of unloading and marketing Elberta peaches at that end of the line?

Ans. to Int. No. 20. The cars arrive at the railroad terminal in Jersey City. After they arrive they are switched from the road to a lighter, ten or twelve cars being run on the lighter, and they

219 tow this li-ter across the river to Pier 29 and they get to Pier 29 some time in the evening when they tie the lighters up to the dock. It is an entirely closed dock. At six o'clock in the evening the doors of the dock are closed up and no one except the em-

ployees of the railroad are allowed to go in. Everybody else is put out of the dock. The doors *is* then locked and no one else can get in. At midnight they put a bulletin up showing the car numbers and the dealers to whom the fruit is sent. At one o'clock in the morning the dock doors are opened and the dealers go in and find their peaches. Between six in the afternoon and one o'clock in the morning the dealers are not allowed to go where the peaches are being unloaded nor on the lighters nor in the cars. They do not know the cars have come until twelve o'clock when the bulletin goes up. The unloading from the cars is done by the railroad employees themselves and no one else is present and you can't be present if you try. At one o'clock the doors *is* opened the empty cars have generally gone back to Jersey City and there ain't no chance of even seeing them on the lighter even from the dock. When the peaches are all sound they are sold at the dock and most always gotten rid of before noon of that day. If a lot of them are bad, the same as this car was, they have to be sorted out and the good ones picked out from the bad ones and a lot of them hauled to my place of business because they do not allow you to resort them or pack them at the dock and if they ain't sold on that day they are sorted over to my place of business, and the sound peaches are re-packed in crates and the bad peaches are thrown away and that takes a lot of time, picking the sound peaches out of two three or four crates to make one crate of good peaches. I  
220 had to get trucks to take them to my store and then had to get extra men to do the sorting and repacking so that they could be sold on the next day. So that I couldn't tell within two or three days and until my bookkeeper had figured up what was going to be lost on each car, what the amount of the damage was, and in some cases it would be three or four days or five days after the car arrived before I would know; and some crates of peaches which looked sound I would sell as sound and then afterwards the purchaser would telephone to me and I would have to go up and look at the peaches and I would then find that there were a lot of them bad and I would have to make an allowance off of the price because I sold them as sound peaches. I wouldn't know this until the next day and then it would take a lot of time to look them over and agree upon the allowance. I couldn't know in thirty-six hours how much damage was done because in a lot of cases it would take more than this time to sort them out and repack them, to say nothing of getting them sold and delivered and figuring up the balance.

221

*Deposition of Adam Miller.*

The deposition of ADAM MILLER, No. 2268 Seventh Avenue, New York City, was read in evidence on behalf of the plaintiff as follows:

Int. No. 1. State your name, age, place of residence and occupation?

Ans. to Int. No. 1. My name is Adam Miller. I am forty-three years old and reside at No. 2268 Seventh Avenue, New York City. I am a commission merchant and a dealer in fruit and produce.

Int. No. 2. Do you know Adam Miller and was he doing business at 328 Washington Street in the City of New York during the months of July and August, 1907, if so, was he a commission merchant, and how long has he been in the business?

Ans. to Int. No. 2. In July and August, 1907, I was doing business at 328 Washington Street in the city of New York as a commission merchant and have been in the business about fifteen years.

Int. No. 3. State whether Adam Miller received and sold the following car of Elberta peaches, to-wit: A. R. T. Car No. 9089 (10756) and on whose account?

Ans. to Int. No. 3. I received and sold the car of Elberta peaches, to-wit: A. R. T. Car 9089 (10756), on my own account.

Int. No. 4. If you say such a car of peaches was received and sold on account of Adam Miller, then state what day said car arrived in New York City, if you know?

Ans. to Int. No. 4. A. R. T. Car 9089 (10756) arrived in Jersey City on August 7th, 1907.

222 Int. No. 5. If you say Adam Miller received and sold such a car of peaches on his account, state how much he received for said car?

Ans. to Int. No. 5. I received for the peaches in that car \$367.50. This car contained 490 crates of peaches.

Int. No. 6. If you say Adam Miller received said peaches and that they were sold on account of Adam Miller, if you have the account sales for said car attach the same to your deposition and mark exhibit "A"?

Ans. to Int. No. 6. I have no account of sales for said car and cannot give it to you.

Int. No. 7. State whether or not you were acquainted with the market price of Elberta peaches in the city of New York in July and August, 1907?

Ans. to Int. No. 7. I was acquainted with the market price of Elberta peaches in New York City in July and August, 1907.

Int. No. 8. If you say you were acquainted with the price of Elberta peaches at the time and place inquired about, then state what was the market value of peaches in car A. R. T. No. 9089 (10756) on the market of said city at the time they were sold in July and August in 1907 and also their market value on the day the peaches should have arrived in New York city if they had not been delayed, in transit?

Ans. to Int. No. 8. The market value of Elberta peaches in the New York City market when they were sold was \$2.25 per crate. Their market value on the day when they should have arrived was \$2.25 per crate.

223 Int. No. 9. If you say you know the market price or value of peaches during the months of July and August, 1907, and also the day of sale as propounded in the last question and you say you know the price at which they were sold, then state whether or not said price was the highest market price for which they could be sold on the market in the condition they were in at the time of their arrival?

Ans. to Int. No. 9. It was.

Int. No. 10. If you say Adam Miller received and sold the peaches inquired about then state if you saw and examined them in the car on their arrival in New York City, then state what condition the peaches were in as to being rotten, specked, bruised, mashed or mouldy or unmarketable peaches?

Ans. to Int. No. 10. I did not go into the car. I saw the peaches immediately after they were unloaded from the car. Fully 70% of the peaches were unmarketable, rotten, specked, mashed, bruised and mouldy. The peaches were leaking in more than a third of the crates when they came out of the car. All of the sound peaches were warm and dry.

Int. No. 11. If you state that you saw such a car of peaches on arrival of same in New York City, or after their arrival and examined them state what if anything, you observed as to the condition of car, car doors, drain pipes, ice in bunkers of car and temperature of same.

Ans. to Int. No. 11. I did not go into the car. The Pennsylvania railroad delivered the car at the Merchants Refrigerator Company's warehouse in Jersey City. The crates of peaches were taken off of the car by the railroad company's employees and put into the refrigerator as fast as they came off of the car. I went over at once and had the peaches sorted and the rotten ones thrown out and  
224 the sound ones re-packed in crates and the crates of sound peaches were then put in to the cars. I did not see the car doors nor the drain pipes nor the ice bunkers. When the peaches were put into the refrigerator they were warm and dry.

Int. No. 12. If you state you saw and examined said car of peaches contained therein and the condition of the bracing, state the condition of the bracing?

Ans. to Int. No. 12. I did not see the bracing.

Int. No. 13. State if you know who paid the freight on the car inquired about and the amount of freight paid and attach the receipt if you have the same and mark the receipt exhibit "B"?

Ans. to Int. No. 13. I paid the freight on this car. The amount was \$291.70. I have not the freight receipt which, I think, was forwarded to Mr. Robert A. Rowe.

Int. No. 14. If you say the peaches inquired about were received and the same were specked, rotten, mouldy or bruised then state whether the condition was uniform throughout the car and if not state what part of the car was such condition the worst?

Ans. to Int. No. 14. The condition of the peaches was not uniform through the car. The two top layers were about 80% rotten and worthless. The third layer was about 60% wholly bad. The lower layers run much better. The top three layers were the worst. There were a lot of bad peaches scattered all through the car.

Int. No. 15. If you say such fruit arrived in a specked, rotten, bruised and mouldy condition then state what proportion  
225 or per cent of the fruit was in said bad condition?

Ans. to Int. No. 15. More than seventy per cent.

Int. No. 16. State if you know when the above mentioned car



was shipped and when it was due to arrive in New York City and the market price of peaches in car when it was due to arrive and also the market price of the peaches in above mentioned car at their arrival if they had been in sound, firm and marketable condition?

Ans. to Int. No. 16. This car was shipped in the evening of July 21, 1907. It was due to arrive in New York four and a half days after that; that would make it the morning of the 26th of July, 1907. On July 26th, the market price was \$2.25 per crate, if sound and merchantable.

Int. No. 17. State whether you or any of your employees told any of employees of delivering carrier of the damaged condition of peaches in said car and whether or not employees of said railroad company went into the car and inspected the peaches and if they did not go into the car did they unload or see the peaches unloaded or see them after they were unloaded and knew of the damaged condition of the peaches, giving name of the employee if you know and the position he holds with the company?

Ans. to Int. No. 17. I do not know.

Int. No. 18. State if you know whether the railroad company at that end of the line had an employee to inspect said car of peaches and knew of the condition in which the car arrived?

Ans. to Int. No. 18. I do not know.

Int. No. 19. Give fully and details the distance from  
226 Miller's place of business to the delivering carrier's railroad and if there is any river between his place of business and railroad, tell what river and the width and describe fully who unloaded the car of peaches and how and where it was unloaded?

Ans. to Int. No. 19. The Merchants Refrigerating Company has a switch or side track running to its doors. The cars run from there to the river and at the river they are run on board a lighter. It is the Hudson river and is about a mile wide. The peaches were unloaded by the railroad company's employees at the Merchants Refrigerating Company's plant.

Int. No. 20. State whether or not if you know that thirty-six hours after notice of the arrival of said car is a reasonable or unreasonable *provision* length of time to give notice to the delivering carrier of a claim of damages giving all of the circumstances and the manner of unloading and marketing Elberta peaches at that end of the line?

Ans. to Int. No. 20. The car arrived at the end of the road in Jersey City. It was then unloaded by the railroad company's employees and the peaches were taken into the Merchants Refrigerating Company. I was then notified of its arrival and went over to the Merchants Refrigerator Company. I put a lot of men at work sorting the peaches, throwing out the rotten and unmarketable ones and re-packing the sound ones in crates. Several cars arrived at the same time. It would take from two to four days to get the sound peaches separated and re-crated and then it would take another day to put them on board the cars and get them over to Pier 29 and sold, and it would be another day before the reports of sale could be



227 made up. It would take nearly four days anyway to find out how many crates of good peaches there were. I went over to the Merchants Refrigerating Company.

228 *Deposition of Adam Miller.*

The deposition of ADAM MILLER, No. 2268 Seventh Avenue, New York City, was read in evidence on behalf of the plaintiff as follows:

Int. No. 1. State your name, age, place of residence and occupation?

Ans. to Int. No. 1. My name is Adam Miller. I am forty-three years old and reside at No. 2268 Seventh Avenue, New York City; I am a commission merchant and a dealer in fruit and produce.

Int. No. 2. Do you know Adam Miller and was he doing business at 328 Washington Street in the City of New York during the months of July and August, 1907, if so, was he a commission merchant, and how long has he been in the business?

Ans. to Int. No. 2. In July and August, 1907, I was doing business at 328 Washington Street in the City of New York as a commission merchant and have been in the business about fifteen years.

Int. No. 3. State whether Adam Miller received and sold the following car of Elberta peaches, to-wit: A. R. T. Car No. 8683, and on whose account?

Ans. to Int. No. 3. I received and sold the car of Elberta peaches, to-wit: A. R. T. Car No. 8683 on my own account.

Int. No. 4. If you say such a car of peaches was received and sold on account of Adam Miller, then state what day said car arrived in New York if you know?

Ans. to Int. No. 4. A. R. T. Car No. 8683 arrived in New York City on July 30, 1907.

229 Int. No. 5. If you say Adam Miller received and sold such a car of peaches on his account, state how much he received for said car.

Ans. to Int. No. 5. I received for the peaches in that car \$367.50. This car contained 490 crates of peaches.

Int. No. 6. If you say Adam Miller received said peaches and that they were sold on account of Adam Miller, if you have the account sales for said car attach the same to your deposition and mark exhibit "A"?

Ans. to Int. No. 6. I have no account of sales for said car and cannot give it to you.

Int. No. 7. State whether or not you were acquainted with the market price of Elberta peaches in the city of New York in July and August, 1907?

Ans. to Int. No. 7. I was acquainted with the market price of Elberta peaches in New York City in July and August of 1907.

Int. No. 8. If you say you were acquainted with the price of Elberta peaches at the time and place inquired about, then state what was the market value of peaches in car A. R. T. No. 8683 on

the market of said city at the time they were sold in July and August in 1907, and also their market value on the day the peaches should have arrived in New York City if they had not been delayed in transit?

Ans. to Int. No. 8. The market value of Elberta peaches in the New York City market when they were sold was \$2.25 per crate. Their market value on the day when they should have arrived was \$2.25 per crate.

230 Int. No. 9. If you say you know the market price or value of peaches during the months of July and August, 1907, and also the day of sale as propounded in the last question and you say you know the price at which they were sold, then state whether or not said price was the highest price for which they could be sold on the market in the condition they were in at the time of their arrival?

Ans. to Int. No. 9. It was.

Int. No. 10. If you say Adam Miller received and sold the peaches inquired about then state if you saw and examined them in the car on their arrival in New York City, then state what condition the peaches were in as to being rotten, specked, bruised, mashed or mouldy or unmarketable peaches?

Ans. to Int. No. 10. I did not go into the car. I saw them as soon as they were unloaded. Fully 70% of the peaches were unmarketable, rotten, specked, mashed, bruised and mouldy. When they were put on the dock they were leaking in more than half of the crates. The sound peaches were warm and dry. The peaches in that car were warm and dry.

Int. No. 11. If you state that you saw such a car of peaches on arrival of same in New York City, or after their arrival and examined them, state what if anything, you observed as to the condition of car, car doors, drain pipes, ice in bunkers of car and temperature of same?

Ans. to Int. No. 11. I did not go into the car. The Pennsylvania Railroad, which owns the dock, do not permit me to go either on board the lighter or into the car. I did not see the car doors nor drain pipes nor the ice bunkers. When the peaches came out of the car they were warm and dry except the wetness from leakage.

231 Int. No. 12. If you state you saw and examined said car of peaches contained therein and the condition of the bracing, state the condition of the bracing?

Ans. to Int. No. 12. I did not see the bracing.

Int. No. 13. State if you know who paid the freight on the car inquired about and the amount of freight paid and attach the receipt if you have the same and mark the receipt exhibit "B"?

Ans. to Int. No. 13. I paid the freight on this car. The amount was \$—. I have not the freight receipt which, I think, was forwarded to Mr. Robert A. Rowe.

Int. No. 14. If you say the peaches inquired about were received and the same were specked, rotten, mouldy or bruised then state

whether the condition was uniform throughout the car and if not, state what part of the car was such condition the worst?

Ans. to Int. No. 14. The conditions of the peaches was not uniform through the car. The two top layers were about 60% rotten and worthless. The third layer was about 60% wholly bad. The lower layers run much better. The top three layers were the worst. There were a lot of bad peaches scattered all through the car.

Int. No. 15. If you say such fruit arrived in a specked, rotten, bruised and mouldy condition, then state what proportion or per cent of the fruit was in said bad condition?

Ans. to Int. No. 15. More than 70%.

Int. No. 16. State if you know when the above mentioned  
232 car was shipped and when it was due to arrive in New York City and the market price of peaches in car when it was due to arrive and also the market price of the peaches in above mentioned car at their arrival if they had been in sound, firm and marketable condition?

Ans. to Int. No. 16. This car was shipped in the evening of July 20, 1907. It was due to arrive in New York four and a half days after that; that would make it in the morning of July 25, 1907. On July 25, the market price was \$2.25 per crate, if sound and marketable.

Int. No. 17. State whether you or any of your employees told any of the employees of delivering carrier of the damaged condition of peaches in said car and whether or not employees of said railroad company went into the car and inspected the peaches and if they did not go into the car did they unload or see the peaches unloaded or see them after they were unloaded and knew of the damaged condition of the peaches, giving name of the employee if you know and the position he holds with the company?

Ans. to Int. No. 17. I called the attention of the dock foreman to the bad peaches and told him they were not iced and had gone bad. I don't know the dock foreman's name. He is in the employ of the Pennsylvania Railroad, which owns the dock where the peaches were unloaded from the car which was lightered from Jersey City to New York. I don't know his name. He looked at them and went away.

Int. No. 18. State if you know whether the railroad company  
233 at that end of the line had an employee to inspect said car of peaches and knew of the condition in which the car arrived?

Ans. to Int. No. 18. The railroad company has a man at the dock who inspects the peaches as they come on the dock off of the cars and sees the condition which they arrive in.

Int. No. 19. Give fully and details the distance from Adam Miller's place of business to the delivering carrier's railroad and if there is any river between his place if business and railroad, tell what river and the width and describe fully who unloaded the car of peaches and how and where it was unloaded?

Ans. to Int. No. 19. The cars arrive at Jersey City by rail from Arkansas. At Jersey City they run the cars on to a lighter and then are towed to Pier 29, North River, New York, which is at the foot of North Moore Street, where they are unloaded. This dock is five city blocks from my place of business and that means about a quarter of a mile. They are towed across the Hudson River, which is about a mile wide. The peaches are unloaded from the cars and the employees of the railroad and placed upon the dock at Pier 29. I have nothing to do with this unloading and they do not let me go through to see it done. It is all done by the railroad company.

Int. No. 20. State whether or not if you know that thirty-six-hours after notice of the arrival of said car is a reasonable or unreasonable *provision* length of time to give notice to the delivering carrier of a claim of damages giving all of the circumstances and the manner of unloading and marketing Elberta peaches at that end of the line?

234 Ans. to Int. No. 20. The cars arrive at the railroad terminal in Jersey City. After they arrive they are switched from the road to a lighter, ten or twelve cars being run on one lighter, and they tow this lighter across the river to Pier 29 and they get to Pier 29 some time in the evening when they tie the lighters up to the dock. It is an entirely closed dock. At six o'clock in the evening the doors of the dock are closed up and no one except the employees of the railroad company are allowed to go in. Everybody else is put out of the dock. The doors are then locked and no one else can get in. At midnight they put a bulletin up showing the car numbers and the dealers to whom the train is sent. At one o'clock in the morning the dock doors are opened and the dealers go in and find their peaches. Between six in the afternoon and one o'clock in the morning the dealers are not allowed to go where the peaches are being unloaded nor on the lighters nor in the cars. They do not know the cars have come until twelve o'clock when the bulletin goes up. The unloading from the cars is done by the railroad employees themselves and no one else is present and you can't be present if you try. At one o'clock when the doors is opened the empty cars have generally gone back to Jersey City and there ain't no chance of even seeing them on the lighter even from the dock. When the peaches are all sound they are sold at the dock and most always gotten rid of before noon of that day. If a lot of them are bad, the same as this car was, they have to be sorted out and the good ones picked out from the bad ones and a lot of them hauled to my place of business because they do not allow you to re-sort them or

235 pack them at the dock and if they ain't sold on that day they are sorted over to my place of business and the sound peaches are re-packed in crates and the bad peaches are thrown away and that takes a lot of time, picking the sound peaches out of two, three or four crates to make one crate of good peaches. I had to get trucks to take them to my store and then had to get extra men to do the sorting and re-packing so that they could be sold on the next day. So that I couldn't tell within two or three days and until my book-keeper had figured up what was going to be lost on each car, what

the amount of the damage was, and in some cases it would be three or four days or five days after the car arrived before I would know; and some crates of peaches which looked sound I would sell as sound and then afterwards the purchaser would telephone to me and I would have to go up and look at the peaches and I would then find that there were a lot of them bad and I would have to make an allowance off of the price because I sold them as sound peaches. I wouldn't know this until the next day and then it would take a lot of time to look them over and agree upon the allowance. I couldn't know in thirty-six hours how much damage was done because in a lot of cases it would take more than this time to sort them out and re-pack them, to say nothing of getting them sold and delivered and figuring up the balance.

236

*Deposition of Adam Miller.*

The deposition of ADAM MILLER, No. 2268 Seventh Avenue, New York City, was read in evidence on behalf of the plaintiff as follows:

Int. No. 1. State your name, age, place of residence and occupation?

Ans. to Int. No. 1. My name is Adam Miller. I am forty-three years old and reside at No. 2268 Seventh Avenue, New York City. I am a commission merchant and a dealer in fruit and produce.

Int. No. 2. Do you know Adam Miller and was he doing business at 328 Washington Street in the City of New York during the months of July and August, 1907, if so, was he a commission merchant, and how long has he been in the business?

Ans. to Int. No. 2. In July and August, 1907, I was doing business at 328 Washington Street in the City of New York as a commission merchant and have been in the business about fifteen years.

Int. No. 3. State whether Adam Miller received and sold the following car of Elberta peaches, to-wit: A. R. T. Car No. 10875 and on whose account?

Ans. to Int. No. 3. I received and sold the car of Elberta peaches, to-wit: A. R. T. No. 10875 on my own account.

Int. No. 4. If you say such a car of peaches was received and sold on account of Adam Miller, then state what day said car arrived in New York City, if you know?

Ans. to Int. No. 4. A. R. T. Car No. 10875 arrived in New York City on July 26th, 1907.

Int. No. 5. If you say Adam Miller received and sold such  
237 a car of peaches on his account, state how much he received for said car?

Ans. to Int. No. 5. I received for the peaches in that car \$472.50. This car contained 525 crates of peaches.

Int. No. 6. If you say Adam Miller received said peaches and that they were sold on account of Adam Miller, if you have the account sales for said car attach the same to your deposition and mark exhibit "A"?

Ans. to Int. No. 6. I have no account of sales for said car and cannot give it to you.

Int. No. 7. State whether or not you are acquainted with the market price of Elberta peaches in the City of New York in July and August, 1907?

Ans. to Int. No. 7. I was acquainted with the market price of Elberta peaches in New York City in July and August, 1907.

Int. No. 8. If you say you were acquainted with the price of Elberta peaches at the time and place inquired about, then state what was the market value of peaches in car A. R. T. No. 10785 on the market of said city at the time they were sold in July and August in 1907 and also their market value on the day the peaches should have arrived in New York City if they had not been delayed, in transit?

Ans. to Int. No. 8. The market value of Elberta peaches in the New York City market when they were sold was \$2.25 per crate. Their market value on the day when they should have arrived was \$2.25 per crate.

Int. No. 9. If you say you know the market price or value of peaches during the months of July and August, 1907, and  
238 also the day of sale as propounded in the last question and you say you know the price at which they were sold, then state whether or not said price was the highest market price for which they could be sold on the market in the condition they were in at the time of their arrival?

Ans. to Int. No. 9. It was.

Int. No. 10. If you say Adam Miller received and sold the peaches inquired about then state if you saw and examined them in the car on their arrival in New York City, then state what condition the peaches were in as to being rotten, specked, bruised, mashed or mouldy or unmarketable peaches?

Ans. to Int. No. 10. I did not go into the car. I saw them as soon as they were unloaded. Fully 65% of the peaches were unmarketable, rotten, specked, mashed, bruised and mouldy. When they were put on the dock they were leaking in more than a third of the crates. The sound peaches were warm and dry. The peaches in that car were warm and dry.

Int. No. 11. If you state that you saw such a car of peaches on arrival of same in New York City, or after their arrival and examined them, state what if anything, you observed as to the condition of the car, car doors, drain pipes, ice in bunkers of car and temperature of same?

Ans. to Int. No. 11. I did not go into the car. The Pennsylvania Railroad, which owns the dock, do not permit me to go either on board the lighter or into the car. I did not see the car doors nor drain pipes nor the ice bunkers. When the peaches came out of the car they were warm and dry except the wetness from leakage.

Int. No. 12. If you state you saw and examined said car of  
239 peaches contained therein and the condition of the bracing, state the condition of the bracing?

Ans. to Int. No. 12. I did not see the bracing.

Int. No. 13. State if you know who paid the freight on the car



inquired about and the amount of freight paid and attach the receipt if you have the same and mark the receipt exhibit "B"?

Ans. to Int. No. 13. I paid the freight on this car. The amount was \$—. I have not the freight receipt which, I think, was forwarded to Mr. Robert A. Rowe.

Int. No. 14. If you say the peaches inquired about were received and the same were specked, rotten, mouldy or bruised then state whether the condition was uniform throughout the car and if not state what part of the car was such condition the worst?

Ans. to Int. No. 14. The condition of the peaches was not uniform through the carr. The two top layers were about 80% rotten and worthless. The third layer was about 60% wholly bad. The lower layers run much better. The top three layers were the worst. There were a lot of bad peaches scattered all through the car.

Int. No. 15. If you say such fruit arrived in a specked, rotten, bruised and mouldy condition, then state what proportion or per cent of the fruit was in said bad condition?

Ans. to Int. No. 15. More than 65%.

Int. No. 16. State if you know when the above mentioned car was shipped and when it was due to arrive in New York City and the market price of peaches in car when it was due to arrive and also the market price of the peaches in above mentioned car at their arrival if they had been in sound, firm and marketable condition?

Ans. to Int. No. 16. This car was shipped in the evening of July 17, 1907. It was due to arrive in New York four and a half days after that; that would make it the morning of July 22, 1907. On July 22, the market price was \$2.25 per crate, if sound and merchantable.

Int. No. 17. State whether you or any of your employees told any of employees of delivering carrier of the damaged condition of peaches in said car and whether or not employees of said railroad company went into the car and inspected the peaches and if they did not go into the car did they unload or see the peaches unloaded or see them after they were unloaded and knew of the damaged condition of the peaches, giving name of the employee if you know and the position he holds with the company?

Ans. to Int. No. 17. I called the attention of the dock foreman to the bad peaches and told him they were not iced and had gone bad. I don't know the dock foreman's name. He is in the employ of the Pennsylvania Railroad, which owns the dock where the peaches were unloaded from the car which was lightered from Jersey City to New York. I don't know his name. He looked at them and went away.

Int. No. 18. State if you know whether the railroad company at that end of the line had an employee to inspect said car of peaches and knew of the condition in which the car arrived?

Ans. to Int. No. 18. The railroad company has a man at the dock who inspects the peaches as they come on the dock off of the cars and sees the condition which they arrive in.



241 Int. No. 19. Give fully and details the distance from Adam Miller's place of business to the delivering carrier's railroad and if there is any river between his place of business and railroad tell what river and the width and describe fully who unloaded the car of peaches and how and where it was unloaded?

Ans. to Int. No. 19. The cars arrive at Jersey City by rail from Arkansas. At Jersey City they run the cars on to a lighter and they are towed to Pier 29, North River, New York, which is at the foot of North Moore Street, where they are unloaded. This dock is five city blocks from my place of business and that means about a quarter of a mile. They are towed across the Hudson River which is about a mile wide. The peaches are unloaded from the cars by employees of the railroad and placed upon the dock at Pier 29. I have nothing to do with this unloading and they do not let me go through to see it done. It is all done by the railroad company.

Int. No. 20. State whether or not if you know that thirty-six hours after notice of the arrival of said car is a reasonable or unreasonable *provision* length of time to give notice to the delivering carrier of a claim of damages giving all of the circumstances and the manner of unloading and marketing Elberta peaches at that end of the line?

Ans. to Int. 20. The cars arrive at the railroad terminal in Jersey City. After they arrive they are switched from the road to a lighter, ten or twelve cars being run on one lighter and they tow this lighter across the river to Pier 29 and they get to Pier 29 some time in the evening when they tie the lighters up to the dock. It is an  
242 entirely closed dock. At six o'clock in the evening the doors of the dock are closed up and no one except the employees of the railroad are allowed to go in. Everybody else is put out of the dock. The doors is then locked and no one else can get in. At midnight they put a bulletin up showing the car numbers and the dealers to whom the fruit is sent. At one o'clock in the morning the dock doors are opened and the dealers go in and find their peaches. Between six in the afternoon and one o'clock in the morning the dealers are not allowed to go where the peaches are being unloaded nor on the lighters nor in the cars. They do not know the cars have come until twelve o'clock when the bulletin goes up. The unloading from the cars is done by the railroad employees themselves and no one else is present and you can't be present if you try. At one o'clock when the doors is opened the empty cars have generally gone back to Jersey City and there ain't no chance of even seeing them on the lighter even from the dock. When the peaches are all sound they are sold at the dock and most always gotten rid of before noon of that day. If a lot of them are bad, the same as this car was, they have to be sorted out and the good ones picked out from the bad ones and a lot of them hauled to my place of business because they do not allow you to re-sort them or pack them at the dock and if they ain't sold on that day they are sorted over to my place of business and the sound peaches are re-packed in crates and the bad peaches are thrown away and that takes a lot of time, picking the sound peaches out of two, three or four crates to make

one crate of good peaches. I had to get trucks to take them to my store and then had to get extra men to do the sorting and re-packing so that they could be sold on the next day. So that I couldn't  
243 tell within two or three days and until my bookkeeper had figured up what was going to be lost on each car, what the amount of the damage was, and in some cases it would be three or four days or five days after the car arrived before I would know; and some crates of peaches which looked sound I would sell as sound and then afterwards the purchaser would telephone me and I would have to go up and look at the peaches and I would then find that there were a lot of them bad and I would have to make an allowance off of the price because I sold them as sound peaches, I wouldn't know this until the next morning and then it would take a lot of time to look them over and agree upon the allowance. I couldn't know in thirty-six hours how much damage was done because in a lot of cases it would take more than this time to sort them out and re-pack them, to say nothing of getting them sold and delivered and figuring up the balance.

244

*Deposition of Adam Miller.*

The deposition of ADAM MILLER, 2268 Seventh Avenue, New York City, was read in evidence on behalf of the plaintiff as follows:

Int. No. 1. State your name, age, place of residence and occupation?

Ans. to Int. No. 1. My name is Adam Miller. I am forty-three years old and reside at No. 2268 Seventh Avenue, New York City. I am a commission merchant and a dealer in fruit and produce.

Int. No. 2. Do you know Adam Miller and was he doing business at 328 Washington Street in the City of New York during the months of July and August, 1907, if so, was he a commission merchant, and how long has he been in the business?

Ans. to Int. No. 2. In July and August, 1907, I was doing business at 328 Washington Street in the City of New York as a commission merchant and have been in business about fifteen years.

Int. No. 3. State whether Adam Miller received and sold the following car of Elberta peaches, to-wit: A. R. T. Car No. 9478, and on whose account?

Ans. to Int. No. 3. I received and sold the car of Elberta peaches, to-wit: A. R. T. Car 9478 on my own account.

Int. No. 4. If you say such a car of peaches was received and sold on account of Adam Miller, then state what day said car arrived in New York City, if you know?

Ans. to Int. No. 4. A. R. T. Car No. 9478 arrived in Jersey City on August 7th, 1907.

Int. No. 5. If you say Adam Miller received and sold such  
245 a car of peaches on his account, state how much he received for said car?

Ans. to Int. No. 5. I received for the peaches in that car \$294.00. This car contained 490 crates of peaches.

Int. No. 6. If you say Adam Miller received said peaches and that they were sold on account of Adam Miller, if you have the account sales for said car attach the same to your deposition and mark exhibit "A"?

Ans. to Int. No. 6. I have no account of sales for said car and cannot give it to you.

Int. No. 7. State whether or not you were acquainted with the market price of Elberta peaches in the city of New York in July and August 1907?

Ans. to Int. No. 7. I was acquainted with the market price of Elberta peaches in New York City in July and August of 1907.

Int. No. 8. If you say you were acquainted with the price of Elberta peaches at the time and place inquired about, then state what was the market value of peaches in car A. R. T. No. 9478 on the market of said city at the time they were sold in July and August in 1907, and also their market value on the day the peaches should have arrived in New York City if they had not been delayed in transit?

Ans. to Int. No. 8. The market value of Elberta peaches in the New York City market when they were sold was \$2.25 per crate. Their market value on the day when they should have arrived was \$2.25 per crate.

Int. No. 9. If you say you know the market price or value of peaches during the months of July and August 1907 and  
246 and also the day of sale as propounded in the last question and you say you know the price at which they were sold, then state whether or not said price was the highest market price for which they could be sold on the market in the condition they were in at the time of their arrival?

Ans. to Int. No. 9. It was.

Int. No. 10. If you say Adam Miller received and sold the peaches inquired about then state if you saw and examined them in the car on their arrival in New York City, then state what condition the peaches were in as to being rotten, specked, bruised, mashed or mouldy or unmarketable peaches?

Ans. to Int. No. 10. I did not go into the car. I saw the peaches immediately after they were unloaded from the car. Fully 75% of the peaches were unmarketable, rotten, specked, mashed, bruised and mouldy. The peaches were leaking in more than half of the crates when they came out of the car. All of the sound peaches were warm and dry.

Int. No. 11. If you state that you saw such a car of peaches on arrival of same in New York City, or after their arrival and examined them, state what if anything, you observed as to the condition of car, car doors, drain pipes, ice in bunkers of car and temperature of same?

Ans. to Int. No. 11. I did not go into the car. The Pennsylvania Railroad delivered the car at the Merchants Refrigerating Company's warehouse in Jersey City. The crates of peaches were taken off of

the car by the railroad company's employees and put into the refrigerator as fast as they came off of the car. I went over at once and had the peaches sorted and the rotten ones thrown out and the sound ones re-packed in crates and the crates of sound peaches  
247 were then put in to the cars. I did not see the car doors nor the drain pipes nor the ice bunkers. When the peaches were put into the refrigerator they were warm and dry.

Int. No. 12. If you say you saw and examined said car of peaches contained therein and the condition of the bracing, state the condition of the bracing?

Ans. to Int. No. 12. I did not see the bracing.

Int. No. 13. State if you know who paid the freight on the car inquired about and the amount of freight paid and attach the receipt if you have the same and mark the receipt exhibit "B"?

Ans. to Int. No. 13. I paid the freight on this car. The amount was \$291.70. I have not the freight receipt which, I think, was forwarded to Mr. Robert A. Rowe.

Int. No. 14. If you say the peaches inquired about were received and the same were specked, rotten, mouldy or bruised, then state whether the condition was uniform throughout the car and if not state what part of the car was such condition the worst?

Ans. to Int. No. 14. The condition of the peaches was not uniform through the car. The two top layers were almost all rotten and unsalable and the third layer was about 70% bad. The fourth layer was about 50% bad and there were rotten peaches and bad ones in almost all the crates in the other layers.

Int. No. 15. If you say such fruit arrived in a specked, rotten, bruised and mouldy condition, then state what proportion or per cent of the fruit was in said bad condition?

248 Ans. to Int. No. 15. More than 75%.

Int. No. 16. State if you know when the above mentioned car was shipped and when it was due to arrive in New York City and the market price of peaches in car when it was due to arrive and also the market price of the peaches in above mentioned car at their arrival if they had been in sound, firm and marketable condition?

Ans. to Int. No. 16. This car was shipped in the evening of July 23, 1907. It was due to arrive in New York four and a half days after that; that would make it the morning of the 28th of July, 1907. On July 28th the market price was \$2.25 per crate, if sound and merchantable.

Int. No. 17. State whether you or any of your employees told any of employees of delivering carrier of the damaged condition of peaches in said car and whether or not employees of said railroad company went into the car and inspected the peaches and if they did not go into the car did they unload or see the peaches unloaded or see them after they were unloaded and knew of the damaged condition of the peaches, giving name of the employee if you know and the position he holds with the company?

Ans. to Int. No. 17. I do not know.

Int. No. 18. State if you know whether the railroad company at

that end of the line had an employee to inspect said car of peaches and knew of the condition in which the car arrived?

Ans. to Int. No. 18. I do not know.

Int. No. 19. Give fully and details the distance from Adam Miller's place of business to the delivering carrier's railroad and if there is any river between his place of business and railroad tell what river and the width and describe fully who unloaded the car of peaches and how and where it was unloaded?

249 Ans. to Int. No. 19. The Merchants Refrigerating Company has a switch or side track running to its doors. The cars run from there to the river and at the river they are run on board a lighter. It is the Hudson River and is about a mile wide. The peaches were unloaded by the railroad company's employees at the Merchants Refrigerating Company's plant.

Int. No. 20. State whether or not if you know that thirty-six hours after notice of the arrival of said car is a reasonable or unreasonable *provision* length of time to give notice to the delivering carrier of a claim of damages giving all of the circumstances and the manner of unloading and marketing Elberta peaches at that end of the line?

Ans. to Int. No. 20. The car arrived at the end of the road in Jersey City. It was then unloaded by the railroad company's employees and the peaches taken into the Merchants Refrigerating Company. I was then notified of its arrival and went over to the Merchants Refrigerating Company. I put a lot of men at work sorting the peaches, throwing out the rotten and unmarketable ones and re-packing the sound ones in crates. Several cars arrived at the same time. It would take from two to four days to get the sound peaches separated and re-crated and then it would take another day to put them on board the cars and get them over to Pier 29 and sold, and it would be another day before the reports of sale could be made up. It would take nearly four days anyway to find out how many crates of good peaches there were. I went over to the Merchants Refrigerating Company.

250

*Deposition of Adam Miller.*

The deposition of ADAM MILLER, 2268 Seventh Avenue, New York City, was read in evidence on behalf of the plaintiff as follows:

Int. No. 1. State your name, age, place of residence and occupation?

Ans. to Int. No. 1. My name is Adam Miller. I am forty-three years old and reside at No. 2268 Seventh Avenue, New York City. I am a commission merchant and a dealer in fruit and produce.

Int. No. 2. Do you know Adam Miller and was he doing business at 328 Washington Street in the City of New York during the months of July and August, 1907, if so, was he a commission merchant, and how long has he been in the business?

Ans. to Int. No. 2. In July and August, 1907, I was doing busi-

ness at 328 Washington Street in the City of New York as a commission merchant and have been in business about fifteen years.

Int. No. 3. State whether Adam Miller received and sold the following car of Elberta peaches, to-wit: A. R. T. Car No. 8711 and on whose account?

Ans. to Int. No. 3. I received and sold the car of Elberta peaches, to-wit: A. R. T. Car No. 8711 on my own account.

Int. No. 4. If you say such a car of peaches was received and sold on account of Adam Miller, then state what day said car arrived in New York City, if you know?

Ans. to Int. No. 4. A. R. T. Car No. 8711 arrived in Jersey City on August 7, 1907.

251 Int. No. 5. If you say Adam Miller received and sold such a car of peaches on his account, state how much he received for said car?

Ans. to Int. No. 5. I received for the peaches in that car \$490.00. This car contained 290 crates of peaches.

Int. No. 6. If you say Adam Miller received said peaches and that they were sold on account of Adam Miller, if you have the account sales for said car attach the same to your deposition and mark exhibit "A"?

Ans. to Int. No. 6. I have no account sales for said car and cannot give it to you.

Int. No. 7. State whether or not you were acquainted with the market price of Elberta peaches in the City of New York in July and August, 1907?

Ans. to Int. No. 7. I was acquainted with the market price of Elberta peaches in New York City in July and August of 1907.

Int. No. 8. If you say you were acquainted with the price of Elberta peaches at the time and place inquired about, then state what was the market value of peaches in car A. R. T. No. 8711 on the market of said city at the time they were sold in July or August in 1907, and also their market value on the day the peaches was sold had they been sound firm and in good marketable condition and also their market value on the day the peaches should have arrived in New York City if they had not been delayed, if they were delayed in transit?

Ans. to Int. No. 8. The market value of Elberta peaches in the New York City market when they were sold was \$2.25 per  
252 crate. Their market value on the day when they should have arrived was \$2.25 per crate.

Int. No. 9. If you say you know the market price or value of peaches during the months of July and August 1907 and also the day of sale as propounded in the last question and you say you know the price at which they were sold, then state whether or not said price was the highest market price for which they could be sold on the market in the condition they were in at the time of their arrival?

Ans. to Int. No. 9. It was.

Int. No. 10. If you say Adam Miller received and sold the peaches inquired about, then state if you saw and examined them in the



car on their arrival in New York City, then state what condition the peaches were in as to being rotten, specked, bruised, mashed or mouldy and unmarketable peaches?

Ans. to Int. No. 10. I did not go into the car. I saw the peaches immediately after they were unloaded from the car. Fully 60% of the peaches were unmarketable, rotten, specked, mashed, bruised and mouldy. The peaches were leaking in more than half of the crates when they came out of the car. All of the sound peaches were warm and dry.

Int. No. 11. If you state that you saw such a car of peaches on arrival of same in New York City, or after their arrival and examined them, state what if anything, you observed as to the condition of the car doors, drain pipes, ice in bunkers of car and temperature of same?

Ans. to Int. No. 11. I did not go into the car. The Pennsylvania Railroad delivered the car at the Merchants Refrigerating Company's warehouse in Jersey City. The crates of peaches were  
253 taken off of the car by the railroad company's employees and put into the refrigerator as fast as they came off of the car. I went over at once and had the peaches sorted and the rotten ones thrown out and the sound ones re-packed in crates and the crates of sound peaches were then put into the cars. I did not see the car doors nor the drain pipes nor the ice bunkers. When the peaches were put into the refrigerator they were warm and dry.

Int. No. 12. If you state you saw and examined said car and if you examined the peaches contained therein and the condition of the bracing, state the condition of the bracing?

Ans. to Int. No. 12. I did not see the bracing.

Int. No. 13. State if you know who paid the freight on the car inquired about and the amount of freight paid and attach the receipt if you have the same and mark the receipt exhibit "B"?

Ans. to Int. No. 13. I paid the freight on this car. The amount was \$311.32. I have not the freight receipt which, I think, was forwarded to Mr. Robert A. Rowe.

Int. No. 14. If you say the peaches inquired about were received and the same were specked, rotten, mouldy or bruised then state whether the condition was uniform throughout the car and if not state what part of the car was such condition the worst?

Ans. to Int. No. 14. The condition of the peaches was not uniform through the car. The two top layers were about 70% rotten and the third layer about 50% bad. There were rotten peaches and  
bad ones in almost all of the crates in the other layers.

254 Int. No. 15. If you say such fruit arrived in a specked, rotten, bruised and mouldy condition, then state what proportion or per cent of the fruit was in said bad condition?

Ans. to Int. No. 15. More than 60%.

Int. No. 16. State if you know when the above mentioned car was shipped and when it was due to arrive in New York City and the market price of the peaches in car when it was due to arrive and also the market price of the peaches in above mentioned car



at their arrival if they had been in sound firm and marketable condition?

Ans. to Int. No. 16. This car was shipped in the evening of July 23, 1907. It was due to arrive in New York four and a half days after that; that would make it the morning of July 28, 1907. On July 28, the market price was \$2.25 per crate, if sound and merchantable.

Int. No. 17. State whether you or any of your employees told any of the employees of delivering carrier of the damaged condition of peaches in said car and whether or not any employees of said railroad company went into the car and inspected the peaches and if they did not go into the car did they unload or see the peaches unloaded or see them after they were unloaded and knew of the damaged condition of the peaches; giving name of the employee if you know and position he holds with the company?

Ans. to Int. No. 17. I do not know.

Int. No. 18. State if you know whether the railroad company at that end of the line had an employee to inspect said car of peaches and knew of the condition in which the car arrived?

255 Ans. to Int. No. 18. I do not know.

Int. No. 19. Give fully and in detail the distance from Adam Miller's place of business to the terminal of the delivering carrier's railroad and if there is any river between his place of business and railroad and tell what river and the width and describe fully who unloaded the car of peaches and how and where it was unloaded?

Ans. to Int. No. 19. The Merchants Refrigerating Company has a switch or side track running to its doors. The cars run from there to the river and at the river they are run on board a lighter. It is the Hudson River and is about a mile wide. The peaches were unloaded by the railroad company's employees at the Merchants Refrigerating Company's plant.

Int. No. 20. State whether or not if you know that thirty-six hours after the notice of the arrival of said car is a reasonable or unreasonable *provision* length of time to give notice to the delivering carrier of a claim of damages giving all of the circumstances and the manner of unloading and marketing Elberta peaches at that end of the line.

Ans. to Int. No. 20. The car arrived at the end of the road in Jersey City. It was then unloaded by the railroad company's employees and the peaches taken into the Merchants Refrigerating Company. I was then notified of its arrival and went over to the Merchants Refrigerating Company. I put a lot of men at work sorting the peaches, throwing out the rotten and unmarketable ones and re-packing the sound ones in crates. Several cars arrived at the same time. It would take from two two four days to get the sound peaches separated and re-crated and then it would take another

256 day to put them on board the cars and get them over to Pier 29, and sold, and it would be another day before the report of sale could be made up. It would take nearly four days

anyway to find out how many crates of good peaches there were. I went over to the Merchants Refrigerating Company.

257

*Deposition of Adam Miller.*

The deposition of ADAM MILLER, 2268 Seventh Avenue, New York City, was read in evidence on behalf of the plaintiff as follows:

Int. No. 1. State your name, age, place of residence and occupation?

Ans. to Int. No. 1. My name is Adam Miller. I am forty three years old and reside at No. 2263 Seventh Avenue, New York City. I am a commission merchant and a dealer in fruit and produce.

Int. No. 2. Do you know Adam Miller and was he doing business at 328 Washington Street in the city of New York during the months of July and August, 1907, if so, was he a commission merchant, and how long has he been in the business?

Ans. to Int. No. 2. In July and August, 1907, I was doing business at 328 Washington Street in the city of New York as a commission merchant and have been in business about fifteen years.

Int. No. 3. State whether Adam Miller received and sold the following car of Elberta peaches, to wit: A. R. T. Car No. 10542 and on whose account?

Ans. to Int. No. 3. I received and sold the car of Elberta peaches, to wit: A. R. T. Car No. 10542 on my own account.

Int. No. 4. If you say such a car of peaches was received and sold on account of Adam Miller, then state what day said car arrived in New York City, if you know?

Ans. to Int. No. 4. A. R. T. Car No. 10542 arrived in New York City on July 29, 1907.

Int. No. 5. If you say Adam Miller received and sold such a car of peaches on his own account, state how much he received for said car?

Ans. to Int. No. 5. I received for the peaches in that car \$472.50. This car contained 525 crates of peaches.

258 Int. No. 6. If you say Adam Miller received said peaches and that they were sold on account of Adam Miller, if you have the account sales for said car attach the same to your deposition and mark exhibit "A"?

Ans. to Int. No. 6. I have no account of sales for said car and cannot give it to you.

Int. No. 7. State whether or not you were acquainted with the market price of Elberta peaches in the city of New York in July and August, 1907?

Ans. to Int. No. 7. I was acquainted with the market price of Elberta peaches in New York City in July and August of 1907.

Int. No. 8. If you say you were acquainted with the price of Elberta peaches at the time and place inquired about, then state what was the market value of peaches in car A. R. T. No. 10542 on the market of said City at the time they were sold in July or August in 1907 and also their market value on the date the peaches was sold

had they been sound, firm and in good marketable condition and also their market value on the day the peaches should have arrived in New York City if they had not been delayed, if they were delayed in transit?

Ans. to Int. No. 8. The market value of Elberta peaches in the New York City market when they were sold was \$2.25 per crate. Their market value on the day when they should have arrived was \$2.25 per crate.

Int. No. 9. If you say you know the market price or value of peaches during the months of July and August, 1907 and also the day of sale as propounded in the last question and you say you know the price at which they were sold, then state whether or not said price was the highest market price for which they could be sold on the market in the condition they were in at the time of  
259 their arrival?

Ans. to Int. No. 9. It was.

Int. No. 10. If you say Adam Miller received and sold the peaches inquired about, then state if you saw and examined them in the car on their arrival in New York City, then state what condition the peaches were in as to being rotten, specked, bruised, mashed or mouldy and unmarketable peaches?

Ans. to Int. No. 10. I did not go into the car. I saw them as soon as they were unloaded. Fully 70% of the peaches were unmarketable, rotten, specked, mashed, bruised and mouldy. When they were put on the dock they were leaking in more than half of the crates. The sound peaches were warm and dry. The peaches in that car were warm and dry.

Int. No. 11. If you state that you saw such a car of peaches on arrival of same in New York City, or after their arrival and examined them, state what if anything, you observed as to the condition of the car, car doors, drain pipes, ice in bunkers of car and temperature of same?

Ans. to Int. No. 11. I did not go into the car. The Pennsylvania Railroad, which owns the dock, do not permit me to go either on board the lighter or into the car. I did not see the car doors nor drain pipes nor the ice bunkers. When the peaches came out of the car they were warm and dry except the wetness from leakage.

Int. No. 12. If you state you saw and examined said car and if you examined the peaches contained therein and the condition of the bracing, state the condition of the bracing?

Ans. to Int. No. 12. I did not see the bracing.

Int. No. 13. State if you know who paid the freight on the car inquired about and the amount of freight paid and attach the receipt if you have the same and mark the receipt exhibit "B"?

260 Ans. to Int. No. 13. I paid the freight on this car. The amount was \$—. I have not the freight receipt which, I think, was forwarded to Mr. Robert A. Rowe.

Int. No. 14. If you say the peaches inquired about were received and the same were specked, rotten, mouldy or bruised then state whether the condition was uniform throughout the car and if not state what part of the car was such condition the worst?

Ans. to Int. No. 14. The condition of the peaches was not uniform.

Int. No. 15. If you say such fruit arrived in a speckled, rotten, and worthless. The third layer was about 60% wholly bad. The lower layers run much better. The top three layers were the worst. There were a lot of bad peaches scattered all through the car.

Int. No. 15. If you say such fruit arrived in a speckled, rotten, bruised and mouldy condition, then state what proportion or per cent of the fruit was in said bad condition?

Ans. to Int. No. 15. More than 70%.

Int. No. 16. State if you know when the above mentioned car was shipped and when it was due to arrive in New York City and the market price of the peaches in car when it was due to arrive and also the market price of the peaches in above mentioned car at their arrival if they had been in sound, firm and marketable condition?

Ans. to Int. No. 16. This car was shipped in the evening of July 19, 1907. It was due to arrive in New York four and a half days after that; that would make it the morning of July 24th, 1907. On July 24th, the market price was \$2.25 per crate, if sound and merchantable.

Int. No. 17. State whether you or any of your employees told any of employees of delivering carrier of the damaged condition  
261 of peaches in said car and whether or not any employees of said railroad company went into the car and inspected the peaches and if they did not go into the car did they unload or see the peaches unloaded or see them after they were unloaded and knew of the damaged condition of the peaches? Giving name of the Employee if you know and position he holds with the Company?

Ans. to Int. No. 17. I called the attention of the dock foreman to the bad peaches and told him they were not iced and had gone bad. I don't know the dock foreman's name. He is in the employ of the Pennsylvania Railroad, which owns the dock where the peaches were unloaded from the car which was lighted from Jersey City to New York. I don't know his name. He looked at them and went away.

Int. No. 18. State if you know whether the railroad company at that end of the line had an employee to inspect said car of peaches and knew of the condition in which the car arrived?

Ans. to Int. No. 18. The railroad company has a man at the dock who inspects the peaches as they come on the dock off of the cars and sees the condition which they arrive in.

Int. No. 19. Give fully and in details the distance from Adam Miller's place of business to the terminal of the delivering carrier's railroad and if there is any river between his place of business and railroad tell what river and the width and describe fully who unloaded the car of peaches and how and where it was unloaded?

Ans. to Int. No. 19. The cars arrive at Jersey City by rail from Arkansas. At Jersey City they run the cars on to a lighter and then are towed to Pier 29, North River, New York, which is at the foot of North Moore Street, where they are unloaded. This dock is five city blocks from my place of business and that means about

262 a quarter of a mile. They are towed across the Hudson River which is about a mile wide. The peaches are unloaded from the cars by employees of the railroad and placed upon the dock at Pier 29. I have nothing to do with this unloading and they do not let me go through to see it done. It is all done by the railroad company.

Int. No. 20. State whether or not if you know that thirty six hours after notice of the arrival of said car is a reasonable or unreasonable *provision* length of time to give notice to the delivering carrier of a claim of damages giving all of the circumstances and the manner of unloading and marketing Elberta peaches at that end of the line?

Ans. to Int. No. 20. The cars arrive at the railroad terminal in Jersey City. After they arrive they are switched from the road to a lighter, ten or twelve cars being run on one lighter and they tow this lighter across the river to Pier 29 and they get to Pier 29 some time in the evening when they tie the lighters up to the dock. It is an entirely closed dock. At six o'clock in the evening the doors of the dock are closed up and no one except the employees of the railroad are allowed to go in. Everybody else is put out of the dock. The doors is then locked and no one else can get in. At midnight they put a bulletin up showing the car numbers and the dealers to whom the fruit is sent. At one o'clock in the morning the dock doors are opened and the dealers go in and find their peaches. Between six in the afternoon and one o'clock in the morning the dealers are not allowed to go where the peaches are being unloaded nor on the lighters nor in the cars. They do not know the cars have come until twelve o'clock when the bulletin goes up. The unloading from the cars is done by the railroad employees themselves and no one else is present and you can't be present if

263 you try. At one o'clock when the doors is opened the empty cars have generally gone back to Jersey City and there ain't no chance of even seeing them on the lighter even from the dock. When the peaches are all sound they are sold at the dock and most always gotten rid of before noon of that day. If a lot of them are bad, the same as this car was, they have to be sorted out and the good ones picked out from the bad ones and a lot of them hauled to my place of business because they do not allow you to resort them or pack them at the dock and if they ain't sold on that day they are sorted over to my place of business and the sound peaches are repacked in crates and the bad peaches are thrown away and that takes a lot of time, picking the sound peaches out of two, three or four crates to make one crate of good peaches. I had to get trucks to take them to my store and then had to get extra men to do the sorting and repacking so that they could be sold on the next day. So that I couldn't tell within two or three days and until my book-keeper had figured up what was going to be lost on each car, what the amount of damage was, and in some cases it would be three or four days or five days after the car arrived before I would know; and some crates of peaches which looked sound I would sell as sound and then afterwards the purchaser would telephone to me and I

would have to fo up and look at the peaches and I would then find that there were a lot of them bad and I would have to make an allowance off of the price because I sold them as sound peaches. I wouldn't know this until the next day and then it would take a lot of time to look them over and agree upon the allowance. I couldn't know in thirty-six hours how much damage was done because in a lot of cases it would take more than this time to sort them out and repack them, to say nothing of getting them sold and delivered and figuring up the balance.

*Deposition of Adam Miller.*

The deposition of ADAM MILLER No. 2268 Seventh Avenue, New York City, was read in evidence on behalf of the plaintiff as follows:

Int. No. 1. State your name, age, place of business and occupation?

Ans. to Int. No. 1. My name is Adam Miller. I am forty-three years old and reside at No. 2268 Seventh Avenue, New York City; I am a commission merchant and a dealer in fruit and produce.

Int. No. 2. Do you know Adam Miller and was he doing business at 328 Washington Street in the City of New York during the months of July and August, 1907, if so, was he a commission merchant, and how long has he been in the business?

Ans. to Int. No. 2. In July and August, 1907, I was doing business at 328 Washington Street in the City of New York as a commission merchant and have been in business about fifteen years.

Int. No. 3. State whether Adam Miller received and sold the following car of Elberta peaches, to wit: A. R. T. Car No. 10052 and on whose account?

Ans. to Int. No. 3. I received and sold the car of Elberta peaches to wit: A. R. T. Car No. 10052 on my own account.

Int. No. 4. If you say such a car of peaches was received and sold on account of Adam Miller, then state what day said car arrived in New York City if you know?

Ans. to Int. No. 4. A. R. T. Car No. 10052 arrived in New York City on July 29th, 1907.

Int. No. 5. If you say Adam Miller received and sold such a car of peaches on his account, state how much he received for said car?

Ans. to Int. No. 5. I received for the peaches in that car 265 \$384.00. This car contained 490 crates of peaches.

Int. No. 6. If you say Adam Miller received said peaches and that they were sold on account of Adam Miller, if you have the account sales for said car attach the same to your deposition and mark Exhibit "A"?

Ans. to Int. No. 6. I have no account of sales for said car and cannot give it to you.

Int. No. 7. State whether or not you were acquainted with the market price of Elberta peaches in the city of New York in July and August, 1907?



Ans. to Int. No. 7. I was acquainted with the market price of Elberta peaches in New York City in July and August of 1907.

Int. No. 8. If you say you were acquainted with the price of Elberta peaches at the time and place inquired about, then state what was the market value of peaches in car A. R. T. No. 10052 on the market of said city at the time they were — in July and August in 1907 and also their market value on the day the peaches should have arrived in New York City if they had not been delayed, in transit?

Ans. to Int. No. 8. The market value of Elberta peaches in the New York City market when they were sold was \$2.25 per crate. Their market value on the day when they should have arrived was \$2.25 per crate.

Int. No. 9. If you say you know the market price or value of peaches during the months of July and August 1907 and also the day of sale as propounded in the last question and you say you know the price at which they were sold, then state whether or not said price was the highest market price for which they could be sold on the market in the condition they were in at the time of their arrival?

266      Ans. to Int. No. 9. It was.

Int. No. 10. If you say Adam Miller received and sold the peaches inquired about then state if you saw and examined them in the car on their arrival in New York City, then state what condition the peaches were in as to being rotten, specked, bruised, mashed or mouldy or unmarketable peaches?

Ans. to Int. No. 10. I did not go into the car. I saw them as soon as they were unloaded. Fully 80% of the peaches were unmarketable, rotten, specked, mashed, bruised and mouldy. When they were put on the dock they were leaking in more than half of the crates. The *should* peaches were warm and dry. The peaches in th-t car were warm and dry.

Int. No. 11. If you state that you saw such a car of peaches on arrival of same in New York City, or after their arrival and examined them, state what if anything, you observed as to the condition of car, car doors, drain pipes, ice in bunkers of car and temperature of same?

Ans. to Int. No. 11. I did not go into the car. The Pennsylvania Railroad which owns the dock, do not permit me to go either on board the lighter or into the car. I did not see the car doors nor drain pipes nor the ice bunkers. When the peaches came out of the car they were warm and dry except the wetness from leakage.

Int. No. 12. If you state you saw and examined said car of peaches contained therein and the condition of the bracing, state the condition of the bracing?

Ans. to Int. No. 12. I did not see the bracing.

Int. No. 13. State if you know who paid the freight on the car inquired about and the amount of freight paid and attach the receipt if you have the same and mark the receipt exhibit "B"?

267      Ans. to Int. No. 13. I paid the freight on this car. The amount was \$—. I have not the freight receipt which, I think, was forwarded to Mr. Robert A. Rowe.



Int. No. 14. If you say the peaches inquired about were received and the same were specked, rotten, mouldy or bruised then state whether the condition was uniform throughout the car and if not state what part of the car was such condition the worst?

Ans. to Int. No. 14. The condition of the peaches was not uniform through the car. The top layers were nearly wholly bad. The lower layers run much better. The top three layers were the worst. There were a lot of bad peaches scattered all through the car.

Int. No. 15. If you say such fruit arrived in a specked, rotten, bruised and mouldy condition then state what proportion or per cent of the fruit was in said bad condition?

Ans. to Int. No. 15. More than 70%.

Int. No. 16. State if you know when the above mentioned car was shipped and when it was due to arrive in New York City and the market price of peaches in car when it was due to arrive and also the market price of the peaches in above mentioned car at their arrival if they had been in sound, firm and marketable condition?

Ans. to Int. No. 16. This car was shipped in the evening of July 18th, 1907. It was due to arrive in New York four and a half days after that; that would make it the morning of July 23, 1907. On July 23, the market price was \$2.25 per crate, if sound and merchantable.

Int. No. 17. State whether you or any of your employees told any of employees of delivering carrier of the damaged condition of peaches in said car and whether or not employees of said railroad company went into the car and inspected the peaches and if they  
268 did not go into the car did they unload or see the peaches unloaded or see them after they were unloaded and know of the damaged condition of the peaches, giving name of the employee if you know and the position he holds with the company?

Ans. to Int. No. 17. I called the attention of the dock foreman to the bad peaches and told him they were not iced and had gone bad. I don't know the dock foreman's name. He is in the employ of the Pennsylvania Railroad, which owns the dock where the peaches were unloaded from the car which was lighted from Jersey City to New York. I don't know his name. He looked at them and went away.

Int. No. 18. State if you know whether the railroad company at that end of the line had an employee to inspect said car of peaches and knew of the condition in which the car arrived?

Ans. to Int. No. 18. The railroad company has a man at the dock who inspects the peaches as they come on the dock off of the cars and sees the condition which they arrive in.

Int. No. 19. Give fully and details the distance from Adam Miller's place of business to the delivering carrier's railroad and if there is any river between his place of business and railroad tell what river and the width and describe fully who unloaded the car of peaches and how and where it was unloaded?

Ans. to Int. No. 19. The cars arrive at Jersey City by rail from Arkansas. At Jersey City they run the cars on to a lighter and then are towed to Pier 29, North River, New York, which is at the foot of North Moore Street, where they are unloaded. This dock is five

city blocks from my place of business and that means about a *quar*ter of a mile. They are towed across the Hudson River which is about a mile wide. The peaches are unloaded from the cars by  
269 employees of the railroad and placed upon the dock at Pier 29. I have nothing to do with this unloading and they do not let me go through to see it done. It is all done by the railroad company.

Int. No. 20. State whether or not if you know that thirty-six hours after notice of the arrival of said car is a reasonable or unreasonable *provision* length of time to give notice to the delivering carrier of a claim of damages giving all of the circumstances and the manner of unloading and marketing Elberta peaches at that end of the line?

Ans. to Int. No. 20. The cars arrive at the railroad terminal in Jersey City. After they arrive they are switched from the road to a lighter, ten or twelve cars being run on one lighter and they tow this lighter across the river to Pier 29 and they get to Pier 29 some time in the evening when they tie the lighters up to the dock. It is an entirely closed dock. At six o'clock in the evening the doors of the dock are closed up and no one except the employees of the railroad are allowed to go in. Everybody else is put out of the dock. The doors is then locked and no one else can get in. At midnight they put a bulletin up showing the car numbers and the dealers to whom the fruit is sent. At one o'clock in the morning the dock doors are opened and the dealers go in and find their peaches. Between six in the afternoon and one o'clock in the morning the dealers are not allowed to go where the peaches are being unloaded nor on the lighters nor in the cars. They do not know the cars have come until twelve o'clock when the bulletin goes up. The unloading from the cars is done by the railroad employees themselves and no one  
else is present and you can't be present if you try. At one  
270 o'clock when the doors is opened the empty cars have generally gone back to Jersey City and there ain't no chance of even seeing them *in* the lighter even from the dock. When the peaches are all sound they are sold at the dock and most always gotten rid of before noon of that day. If a lot of them are bad, the same as this car was, they have to be sorted out and the good ones picked out from the bad ones and a lot of them hauled to my place of business because they do not allow you to resort them or pack them at the dock and if they ain't sold on that day they are sorted over to my place of business and the sound peaches are repacked in crates and the bad peaches are thrown away and that takes a lot of time, picking the sound peaches out of two, three or four crates to make one crate of good peaches. I had to get trucks to take them to my store and then had to get extra men to do the sorting and repacking so that they could be sold on the next day. So that I couldn't tell within two or three days and until my bookkeeper had figured up what was going to be lost on each car, what the amount of the damage was, and in some cases it would be three or four days or five days after the car arrived before I would know; and some crates of peaches which looked sound I would sell as sound and then afterwards the purchaser would telephone to me and I would have to go up and

look at the peaches and I would find that there were a lot of them bad and I would have to make an allowance off of the price because I sold them as sound peaches. I wouldn't know this until the next day and then it would take a lot of time to look them over and agree upon the allowance. I couldn't know in thirty-six hours how much damage was done because in a lot of cases it would take more than this time to sort them out and repack them, to say nothing of getting them sold and delivered and figuring up the balance.

271

*Cross-interrogatories.*

Cross-interrogatories Propounded to Witness Adam Miller by the Defendant.

Int. No. 1. State whether or not it is a fact that L. A. Taylor was your purchasing agent at Greenwood during the season of 1907, and if he did not purchase for you several carloads of peaches?

Ans. to Int. No. 1. L. A. Taylor was in my employ as purchasing agent at Greenwood, Arkansas, during the season of 1907, and he purchased fourteen cars of peaches for me in that year.

Int. No. 2. Please state if it is not a fact that the said L. A. Taylor purchased for you at Greenwood, six cars of peaches which are included in this suit?

Ans. to Int. No. 2. Car numbers not being given in this question, but suppose the six cars mentioned are included in the fourteen that we purchased.

Int. No. 3. State if it is a fact that the said L. A. Taylor purchased said six cars of peaches for you and drew drafts on you thru the Sebastian County Bank at Greenwood, Ark., for said peaches and if you did not repudiate the purchase after the peaches reached the City of New York, and refused to pay the drafts?

Ans. to Int. No. 3. If cars were given we could state whether these were the cars that we refused to pay drafts on. The purchase of fourteen cars that we made, paid drafts on all excepting five, therefore can not say whether these drafts apply to these cars. I did not repudiate the purchase. I had lost so much money by reason of the peaches being rotten that I didn't have the money and couldn't pay for them. R. A. Rowe came to New York as attorney

272 for the shippers to collect—and I told him I couldn't pay.

I then gave some notes and agreed to pay more when I could collect for my losses.

Int. No. 4. State whether or not you afterwards bought these same peaches at a greatly reduced price in the City of New York?

Ans. to Int. No. 4. I never at any time purchased these peaches at a reduced price in the City of New York.

Int. No. 5. Please state whether or not Mr. R. A. Rowe who is now representing you in this case was not also an agent of yourself in the purchase of peaches and influencing the consignment of peaches to you during the season of 1907?

Ans. to Int. No. 5. Mr. Rowe never acted as agent for me in the

purchase of peaches; simply recognized him as a broker, who was hired by Mr. L. A. Taylor during the season of 1907.

Int. No. 6. Please state fully how long you have known Mr. R. A. Rowe, what acquaintance you have had with him, what business transactions if any, you have had with him, and particularly with reference to the shipment of these peaches and to the peaches involved in this suit?

Ans. to Int. No. 6. Only saw Mr. R. A. Rowe when he was in New York City two or three times, not over half an hour at any time. Further acquaintance none. I had a transaction with him as attorney for the shipper in reference to six cars of peaches at a reduced price for which settlement was made by notes and I agreeing to allow the shipper one-half of what we received on claim.

Int. No. 7. Please state if it is not a fact that you had agreed to pay him the sum of \$24.50 on each car of peaches purchased by you or which were consigned to you through his influence?

273 Ans. to Int. No. 7. Never personally made any agreement with Mr. Rowe to pay him anything for peaches purchased, but this agreement was made by Mr. L. A. Taylor, allowing R. A. Rowe five cents per crate commission for his assistance and influence with the farmers to get the best peaches.

Int. No. 8. Please state if the said Mr. R. A. Rowe at the time the said Mr. L. A. Taylor purchased these peaches for you in the town of Greenwood, Ark., and drew on you through the Sebastian County Bank for the purchase price of said peaches, did not also draw on you through the Sebastian County Bank for the sum of \$24.50 on each of said cars of peaches, and which drafts amounted to \$147, was dishonored by you upon presentation in the city of New York?

Ans. to Int. No. 8. Mr. Rowe did draw draft on me for the sum of \$147.00 on the last six cars of peaches for which I made settlement. This draft was not paid because I didn't have the money. Afterwards I gave a note for it.

Int. No. 9. Please state whether the said commission of \$147 for which Mr. Rowe drew draft on you has ever been paid by you?

Ans. to Int. No. 9. The said commission of \$147 was paid to Mr. Rowe when that note was due.

Int. No. 10. Is it not a fact that Mr. L. A. Taylor purchased these peaches for which you are now claiming damages at Greenwood, Ark., at the rate of \$1.25 a bushel, and if after said peaches were shipped to you in New York City, if you did not refuse to ratify the purchase and afterwards through Mr. Rowe purchased the same peaches at a greatly reduced price at about 65 cents a bushel and giving your notes in payment of said purchase price?

Please answer this question fully and fairly?

274 Ans. to Int. No. 10. Mr. Taylor purchased these peaches from or through the influence of Mr. Rowe at Greenwood, Arkansas, at the rate of \$1.25 per bushel. Paid drafts and wired money for eight cars of these peaches until we received the first six cars and with delay in transit they arrived in an almost worthless condition, and my Mr. Taylor informed me that we were to receive

a six day delivery from both Greenwood and Van Buren of these peaches. The result was that each and every car were from twelve to twenty days in transit. We did not purchase peaches at less than what we agreed to pay for same except by giving note in payment of said purchases at 65 cents per crate and I agreeing to pay one-half of what damages I recovered from the railroads when I get it.

Int. No. 11. Please state how much you finally paid for these peaches a crate, and also state how much you received a crate for them and please state how much commission or how much you paid Mr. R. A. Rowe, either directly or indirectly in these peach transactions covering the entire season of 1907?

Ans. to Int. No. 11. Eight cars of these peaches we paid for in full. Six cars of peaches paid for at 65 cents per crate with the understanding that Mr. Cumbie, who was the shipper and owner of these peaches was to receive one-half the claim that I was to receive from the railroad company. Under these terms a settlement was made. Mr. Rowe received five cents per crate commission on eight cars directly, six cars by note which was paid when it came due.

Int. No. 12. Please state whether or not you gave to Mr. M. Townsend, Agent for the Pennsylvania R. R. Co., Pier 28, North River, New York City, and order to deliver to the Merchants Refrigerating Co. at Jersey City, said six cars of peaches consigned to you from Greenwood, Ark., and if said order did not contain

275 the following provision: "I hereby agree to indemnify you against and save harmless from any suit or legal proceedings, loss, damage, expense, counsel fees and transportation or other charges arising from or caused by your attempt to comply with this request. The full intent and meaning of this indemnity that you are to act as my agent on this transaction, it being further agreed that I assume all responsibility whether request as above is or is not complied with"? And if Mr. Joseph S. Schneider did not accept said request from you and deliver said peaches to the Merchants Refrigerating Co.?

Ans. to Int. No. 12. I issued order to the Pennsylvania Railroad Company to have six cars of these peaches transferred to the Merchants Refrigerating Company in Jersey City as previous to this the Board of Health condemned from 100 to 200 crates of peaches in each and every car that we received in New York City on dock, same being a total loss. Ordering them in Jersey City cold storage we were in position to put help on same, repack them, then reload them in cars again and have them brought to New York a day or two later. As to signing this order, this is the only order the Pennsylvania Railroad Company will recognize but according to the best of my knowledge, that I hereby agree to indemnify them against all losses or legal proceedings only pertains to them carrying out this part of the contract of delivering them to the Merchants Refrigerating Company or failing to do so. The cars were originally billed to Jersey City and this order we signed is nothing more than a re-shipment. Should we not have done this with these peaches, there is no doubt, the Board of Health would have condemned them

all as they informed me that such would be the case upon arrival of the next cars and I only did this for my protection as well as the Railroad Company. I don't know the wording of the orders.

276 Int. No. 13. If you state that you gave such an order to

Mr. M. Townsend, Agent, Pennsylvania R. R. Co., to deliver peaches reaching Jersey City for you to the Merchants' Refrigerating Co. at Jersey City then please state if it is not a fact that the Merchants' Refrigerating Co. accepted these peaches for you and receipted for them in good condition to the Pennsylvania R. R. Co.?

Ans. to Int. No. 13. As to the Merchants' Refrigerating Co., signing for them in good condition, I do not know whether they did or not. I think they signed for them, "contents unknown," the same as they issue their receipts, "said to contain" such and such an article.

Int. No. 14. Please state if the said order was given by you and accepted by the Pennsylvania R. R. Co. did not prevent said peaches from reaching you in New York City?

Ans. to Int. No. 14. Said order was given by me and accepted by the Pennsylvania Railroad Company otherwise peaches would not have been received by the Merchants' Refrigerating Company but would have to come direct to New York.

Int. No. 15. Please state whether or not notice in writing was given by you to the delivering carrier at destination of these peaches of any claim for damages? If so, please attach a copy of said notice to your deposition and mark it exhibit "A" stating the time and the place and the name of the agent to whom said notice was given?

Ans. to Int. No. 15. Notice was given to the Pennsylvania Railroad Company in several ways, by them knowing the condition of the fruit upon arrival on the pier, refusing to allow us on

277 float to examine the temperature of cars, and by the passes the Pennsylvania Railroad Company received signed by the Board of Health, condemning crates of peaches in most every car that we were compelled to put back in the cars and dump same.

Int. No. 16. Please state if you or the Merchants' Refrigerating Co. did not receipt for these cars in good condition?

Ans. to Int. No. 16. I did not nor do I think the Merchants' Refrigerating Company did.

Int. No. 17. If you state that you did not give an order to the agent of the Pennsylvania R. R. Co. to deliver all of the cars of peaches involved in this suit to the Merchants' Refrigerating Co., then please attach copies of the orders given to the Merchants' Refrigerating Co., and the number of cars that they received for you and receipted for to the Pennsylvania R. R. Co. and give the numbers of the cars?



278

*Testimony of J. T. Young.*

J. T. YOUNG, a witness called for the plaintiff, being first duly sworn, testified as follows:

Direct examination:

Q. Mr. Young, how many cars did you inspect on the Iron Mountain Railroad that was shipped to Adam Miller in 1907?

A. I inspected four.

Q. Numbers 8787, 10542, 10875 and 10052, you may state what kind of peaches went into these cars, and the pack?

A. Well, we did not allow anything to get into the car but firm, sound peaches and those packed by the Georgia packers.

Q. I will ask you if Mr. Taylor—was he also there?

A. He was there at different times.

Q. And if he didn't state that you can handle enough to—

Mr. Pryor: Defendant objects.

Q. You may state about the color and appearance of the peaches?

A. After they were packed they were the color of all good ripe sound peaches and in good condition as far as I know anything about it. My examination of the different cars,—that is, the lading as they came in, they were all sound peaches and in good condition.

Cross-examination:

Q. Did you keep a record Mr. Young?

A. Yes sir, I have a record at the time but the record since that time has been misplaced and I have no record of it.

Q. I will ask you if you have any recollection of the numbers of these cars without your record?

A. No, only the numbers as Bro. Rowe called to my mind.  
279 No, I couldn't have any definite recollection as to them. I think these numbers are the numbers.

Q. On what dates did you inspect the peaches at Greenwood?

A. I don't remember the exact dates that I was inspector, the time is so long past.

Q. As a matter of fact then, Mr. Young, if I understand you, without your records you are unable to state definitely that you did inspect these four cars of peaches that have been called over?

A. I cannot recall the numbers just from memory. I remember the numbers were ten-thousands on some of the cars.

Q. And you don't remember the dates even?

A. No sir.

Q. As a matter of fact, you don't know whether you inspected those cars or not?

A. Well, it strikes me that was the numbers.

The Court: You inspected four cars shipped to Adam Miller from Greenwood during that season and you don't remember the numbers?



A. No sir.

Q. How many other cars did you inspect?

A. Only the four.

Q. Do you know whether they were shipped to Adam Miller?

A. Yes sir.

Q. How do you know?

A. I only know that they were consigned to Adam Miller from Brother Rowe.

Q. The bill of lading was in Mr. Rowe's name?

A. I think so.

Q. You are certain of that?

A. I think so.

Q. You didn't see the bill of lading?

280 A. No sir.

Q. You were not interested in where they went to?

A. Yes sir; we were interested in the shipment. I was just representing my father there.

Q. So that your father was interested in these cars?

A. Yes sir.

Q. You knew that your father had been settled with?

A. Yes, he has no claim whatever in this case.

Q. But still those peaches that were shipped here, a number of them belonged to him did they not?

A. Yes sir.

Q. And he has been paid for that?

A. I don't know what settlement he made. I understood he had a settlement for those peaches.

#### Redirect examination:

Q. You don't know that those cars—the four cars you loaded went to Adam Miller?

A. Yes sir.

Q. That is all.

281

#### DEFENDANT'S EVIDENCE.

#### *Testimony of E. F. Strozier.*

ENOCH F. STROZIER, a witness called for the defendant, testified as follows:

#### Direct examination:

Q. You live at Greenwood?

A. Yes sir.

Q. How long have you lived there?

A. About twenty-four or five years.

Q. Were you working for the Iron Mountain Railroad in the year 1907 during the peach shipping season there?

A. Yes sir.

Q. In what capacity did you act at that time?

A. Loading the peaches.

Q. Loading the peaches?

A. Yes sir, and looking after the cars.

Q. Do you remember this car 10875 shipped to Adam Miller, plaintiff to L. A. Taylor?

A. Yes sir.

Q. I will ask you to state to the court what you remember with reference to that car?

A. It was overloaded the limit allowed by the company—960 four basket and 490 six basket crates, and if you overload the company wasn't responsible, and he wanted this one loaded six deep and I refused. I told him he would have to go in and see the agent; that the company did not allow it; that it wouldn't carry it. He went in and seen Rhodes and he told him if he loaded it he would load it on his own responsibility.

Q. You afterwards worked for the Greenwood Fruit Growers' Association?

A. Yes sir.

282 The Court: You put 525 crates in this car in place of 490?

A. Yes sir.

Mr. Rowe: I object to that testimony because I think it is incompetent.

The plaintiff offered to read the deposition of D. T. Goldsmith in evidence, to which the defendant objected because said deposition had never been filed with the papers in the case.

283

*Testimony of C. Bledsoe.*

Mr. C. BLEDSOE, a witness called for the defendant, being first duly sworn, testified as follows:

Direct examination:

Q. Mr. Bledsoe, when was this deposition filed in your office?

A. This was filed this morning but I never put the hour on; I guess about 7:30.

Q. What became of it after it was filed?

A. Mr. Rowe came in and I gave it to him.

Q. It has never been on file with the papers?

A. No sir.

The Court: Overruled; save your exceptions.

The deposition of D. T. Goldsmith was read in evidence:

(Here clerk will copy deposition of D. T. Goldsmith.)

*Agreement.*

It was agreed by the court and counsel on either side of the case that all the general testimony introduced in the case of R. C. Cumbie v. St. L. I. M. & S. Ry. Co. taken on each side, which case had just been tried, might be considered in and treated as being in, which testimony is in words and figures as follows, to wit:

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*Testimony of D. T. Goldsmith.*

D. T. GOLDSMITH, being first duly sworn, testified as follows:

Q. State your name, age, place of residence and occupation.

A. Davis T. Goldsmith; age 49; reside at Van Buren, Ark. wholesale business for the last ten or twelve years. I have lived in Van Buren for nearly 23 years.

Mr. Miles: The defendant objects to the taking of this deposition in Van Buren, Ark. because the cause of action is pending in the Crawford circuit court and the witness has testified that he lived in Crawford County and has lived here for nearly 23 years.

Mr. Miles: Have you any intention of moving out of Crawford County, Mr. Goldsmith?

A. No sir.

Mr. Miles: The defendant's objection renewed.

Q. How long have you been sick, Mr. Goldsmith?

A. Why, I have been off and on since the 20th of March this time. When I came back from the sanitarium the 16th of March and took down with pneumonia. Then I was up part of the time and took a relapse six weeks ago today. I have been up now about two weeks.

By Mr. Rowe: Plaintiffs are taking the testimony of Mr. Davis T. Goldsmith for the purpose of perpetuating it, he having been in ill health—how long have you been in ill health, Mr. Goldsmith?

A. Well, I have been puny since about the middle of November 1911, last year.

Q. And you are sick at this time and not able to attend court?

285 A. Well, of course I am weak now. The pneumonia has left me but I am just weak from being down so long.

By Mr. Miles: You are able to attend court?

A. I might get up next week but I sit up here three or four hours a day here at home.

Q. You are in bed nearly all the time?

A. I am up and down. I just have to rest.

Mr. Rowe: And is at the present time unable to attend court.

Q. You may state how long you have been sick and the nature of your sickness and whether you are able to attend court?

A. I have been sick since about the middle of November, 1911,

that is past working while I was up a couple of times but I wasn't able to do anything. In regards to that, there was some days I went up to the store and helped the boy; some days I could be up and some I couldn't. It was just temporary you know.

Q. How much of the time are you in bed now Mr. Goldsmith?

A. About two-thirds of the time.

Mr. Miles: The defendant states that notice was not given in this case for the purpose of perpetuating testimony as required by statute, and renews its objection to the taking of this deposition of a resident and citizen of Crawford County.

Mr. Rowe:

Q. You are unable to attend court now, Mr. Goldsmith?

A. It is owing to how soon they would want me. Not at present I can't. I couldn't get up those steps.

Q. And you don't know whether you would be able to go at all?

A. Of course, if somebody would carry me up the court house steps I might go next week, but I couldn't get up the stairs.

Mr. Rowe: (Dictating.) But I don't know how I will be next week. A man of my disease may not be here tomorrow. You can't tell.

Q. What disease have you?

286 A. Tuberculosis. I have been down this time with la grippe and pneumonia, but my disease is tuberculosis.

Q. You may state what business you were engaged in in July and August, 1907, respecting the handling of fruit and how if you were in any way connected with the handling of the fruit crop of that year?

A. Well, I was in the wholesale grain and grocery business with W. F. Keller, and also handling crate material. I also speculated a little in the shipment of peaches.

Q. I mean by this question if you had anything to do with the peach crop?

A. I was connected with Payne. I had been to the market in 1905, 1906 and 1907, and sold crops there and I had refused to go.

Mr. Rowe: Just wait a moment. (Dictating.) I was called on by Mr. Payne to go to the markets and assist in selling and handling cars of peaches in the different markets. I consented to go and help them out.

Q. If you went to New York during the peach season of 1907 you may so state?

A. Yes sir.

Q. For what purpose?

A. To handle car loads of peaches from this section and report the condition of cars arriving there.

Q. If you received any instructions from Mr. J. B. Payne to look after the cars of peaches shipped from Greenwood, Ark., you may so state.

A. Yes sir.

Q. You may give the initials and number of every car you saw and examined, giving the condition of the peaches in every car.

A. Well, I will tell you gentlemen. You have got me  
287 under oath and even if I wasn't, it wouldn't make any difference. It is impossible for a man to see every crate of it. It has got to be a certain part of it guess work. To the best of my knowledge, I could give you the average per cent according to my best judgment.

Mr. Rowe: I want to ask as few question- as possible to bring out the facts because it takes time to write them.

A. A. R. T. 10875, this car was reported received in 19516; condition very poor.

Q. By the above question in stating the condition of the peaches I mean for you to also state if you say they were damaged, the per cent of the damaged peaches in every car?

A. My estimate on that car was 75% damage.

Q. The number that you mention of this car, you may state if that was one of the Greenwood cars?

A. Yes sir, that was an Adam Miller car, handled by Adam Miller.

Mr. Miles: Do you mean that 19516?

A. 10875, that was the number the car was supposed to arrive in. I never saw that car at all.

Q. That is you didn't see the car in New York?

A. Adam Miller reported that it had been transferred and had been received in 19516 and the block nailed onto the car load shows that number, 19516. You can't open the car; you are not allowed to as that is done by the longshoremen and nobody allowed in the car.

Q. I will ask you if the number given you by Mr. Payne, by way of refreshing your memory was not 10875?

A. It was.

Q. And you may state if that is the car of peaches you examined, the one just mentioned?

A. I don't know that. They came reported in that car. It was supposed to have been in that car.

288 Q. You may give the initials and number of the next car from Greenwood handled by Adam Miller giving the condition of the peaches, and if you say they were damaged, give the per cent of the damage?

A. A. R. T. 10052, fifty per cent damaged; A. R. T. 10542, that is about 50% damaged in my estimation. A. R. T. 8787, that was about 60 to 75% damaged to the best of my knowledge of it. A. R. T. 10640, this car was so badly damaged that it was not allowed to be sold on the dock. The damage to this car must have been fully 80% damaged. That is all the cars I have that I saw on the dock. Four more A. R. T. cars that was placed in cold storage and I examined them over there but I didn't see them sell nor repacked. That is as far as I could go, what I saw with my own eyes sold on the dock.

Q. You may state Mr. Goldsmith, the initials and number of the cars you saw in cold storage, if you saw any, giving the condition, and if you say they were damaged, give the per cent?

A. A. R. T. 8711, my judgment is 75% damage on that car as I saw it in the cold storage room.

Here the taking of depositions was continued to one o'clock of the same day at the same place.

A. R. T. 9478 I considered it entirely worthless and A. R. T. 8787; those two cars was the ones that were both the same way. A. R. T. 10541,—I have got it 10541. I may have a little error in some of these numbers taking them hurriedly and because it is written down on a board and they don't write a very plain hand, those longshoremen. I guess my numbers are about correct.

Q. I will ask you if 10541 couldn't be 2?

A. I couldn't say; it may be. They are on a little short board. I couldn't say, it might have been, but that is the way I read it off the board, 10541.

289 Q. Well, do you know whether it was a Greenwood car, whether the number is correct or not?

A. Yes sir. I looked at the stencils of some of your growers the names was on the crates. I looked at the different men that packed to see if the men was to blame, or anything of the kind, and there was several men's names with Greenwood stenciled on them so they must have been Greenwood cars, all of them. Now six of the A. R. T. cars I have got; I seen in cold storage those four cars.

Q. Now if you remember, I am calling on you to give the percent of the damage to the peaches in each of these cars. If you have not done so, you may do that.

A. I have done so with two; the other two I would rather not make any per cent on that. They were so I couldn't go all the way around those cars. All I could see was in front. Those two cars that I made my little notation on I considered they wasn't worth repacking. They ought to go to the dump.

Q. I will ask you to make an estimate on those two cars the nest you can, as to the damage on those two cars?

A. I would put it at 75% what I saw.

Q. You may describe the temperature of the cold storage whether it was sufficient to keep peaches, or not?

A. It was splendid; it was very cold, sufficiently cold for any cold storage purpose.

Q. You may state how many were together when the examination of these peaches was made there in the cold storage; how many parties and whether I was along or not?

A. Mr. Adam Miller, Mr. Rowe and myself were the only three in the party.

Q. You may state whether or not Adam Miller had hands in there sorting and repacking the peaches?

A. He did.



Q. You may state how many?

290 A. I can't state how many. I didn't pay much attention; two or three or four or five.

Q. I will ask you by way of refreshing your recollection—but you have already stated that.

A. I couldn't say that. Five years is a long time to remember those things.

Q. You may state if you know Adam Miller's ability in New York to get the market price of the peaches and whether he got the market price of the peaches that he sold for the Greenwood field in the condition they were in?

A. I think Adam Miller was a good hustler and seemed to have a good many friends and I think he done as much towards getting the price as any of the other commission houses I got acquainted with.

Q. You may state if you know the dates of the arrival of these cars?

A. I only have the dates on a few. A. R. T. 10875, July 26th. That is the car that was in question how it was received.

Q. Have you the date that was shipped from Greenwood?

A. I had no bills of lading; I have no record of that.

Q. That was a Greenwood car, was it not?

A. Yes sir, it was a Greenwood car. And 10052 was on July 27th. A. R. T. 10640 I got selling on July 31st.—or repacked rather, or shipped away. It would not be sold. I saw it on the dock before he took it to the storage to repack. He was ordered off the dock with it.

Q. State if you know who ordered them off the dock?

A. The inspector sent them off. Rotten stuff isn't allowed to be sold on the piers. There is an inspector to every pier.

Q. You may state if the dock master there and the railroad  
291 company did not unload these peaches from the cars as they came over to pier 29?

A. I don't know how that is handled. From Hoboken to the piers it is transferred on boats, cars are brought over on boats and there it is turned over to the broker and they furnish the help.

Q. I will ask you if the dock master of the railroad company don't see the fruit when it is put out?

A. Yes sir; he has to inspect every car is my understanding of it.

Q. And he sees the fruit and the condition of it?

A. I don't know.

Q. And if the railroad company employs them to see the fruit they see the cars—

Mr. Miles: We object to those questions as leading.

Q. Do you know whether any of the railroad employees see this stuff or unload it?

A. The longshoremen unload them but I don't know—

Q. Well, if a bill of lading bills a car of peaches from Greenwood, Ark., to Adam Miller, Pier 29, who would do the unloading of the peaches?

Mr. Miles: We object to his thinking.

Q. And placed them on Pier 29?

Mr. Miles: We object because it calls for an opinion of the witness.

A. Well, the railroad company has to pay for the delivery to Pier 29, but the wharf of pier companies that control it, I think furnish the longshoremen, and do that for so much a car for the railroad company.

Q. They do it for the railroad company?

A. Yes sir, that is my understanding, from men that have been in the business there.

Q. They are employed by the railroad company to do that?

A. The piers or whoever handles the docks there.

292 Q. Do you know the name of the dock master there?

A. I do not, sir.

Q. He was employed by the railroad company, was he not?

A. I couldn't tell you; that is too much for me.

Q. Is it the Pennsylvania lines that puts the peaches to pier 29, or do they put them to any pier?

A. They go to any pier that you bill them to. And railroad company does that. Pier 29 is for perishable fruits; 28 is for potatoes and stuff of that kind. Each grade of stuff has its dock or pier.

Q. Explain how the market at New York is conducted and how it is opened and fruit brought over from Jersey City or Hoboken and placed on pier 29?

A. It is brought over on barges or ferries and it is all stacked in respective piles with the numbers of the cars; of what they are loaded and there is a board nailed on that shows the number of the car and initial of the car. They are stacked in that pier and the gates are opened for people to go in at 12 o'clock sharp midnight. That is as soon as anybody is allowed to go in; that is when the market is opened. There is a grand rush then to go in and you find your cars and then go to selling.

Q. By way of refreshing your recollection, isn't the owner of the fruit, the growers of fruit permitted to go on the pier at 12 and a rope around to prevent any buyers or anybody getting in there until one and at one the bell taps and the buyers go on and buy?

A. No sir, I didn't see any rope. I went to business at 12 o'clock and I handled the first car I could find.

Q. The sellers go there too?

293 A. Yes sir, the gates are opened and anybody and everybody goes in, and teams and all.

Q. The buyers are there with the trucks?

A. Yes sir.

Q. When the gates are opened anybody can go in that want to?

A. Yes sir.

Q. How long have you been handling fruit Mr. Goldsmith?

A. I have been to the peach markets three seasons.

Q. Give a detailed account of your handling of Elberta peaches, shipping or selling or carrying to the markets, whatever it has been?

A. I go before the stuff arrives and I make arrangements with some commission house or some broker; that saves me from taking out a license. I couldn't do it without doing through somebody else on account of not having license. I select my men and then the bills of lading. I ascertain where the car will be set and then I am sure to see the condition of the car and held myself to the best of my ability and keep a record of the car, how it arrived and what the stuff sells for and remit for it that day.

Q. Then you have had experience in handling perishable fruit of how many years?

A. Three years.

Q. If a car of fruit is loaded in good condition at Greenwood, Arkansas, and billed to Pier 29, New York, and when it arrives there it is specked, rotten or bruised, what would you attribute the cause to?

A. The car getting warm in transit.

Q. What causes it to get warm in transit?

A. A shortage of ice.

294 Q. Then if I understand you correctly, if a car of peaches is properly iced and kept iced in transit it will carry all right to New York City?

A. Yes sir, it should do it.

Q. What was the market price of peaches in New York City in good condition and properly packed in July and August, 1907?

A. I sold fancy stock as high as \$2.25, but about the average for the best I had for this season that I was employed for was \$2.00, and I had a many a car to arrive delayed that I didn't get anything out of. But good stock, arriving in good condition I got as high as \$2.25, but it was repacked fancy stock.

Q. You may state about the delay in transit of these cars from Greenwood, Arkansas, to New York City that Adam Miller handled?

A. I cannot do it as I had no bills of lading.

Q. Can you approximate the time, the average time?

A. Only from Mr. Miller's statement to me. He said he had some—

Mr. Miles: We object to that.

Mr. Rowe: Yes, that wouldn't be proper to state.

Q. I will ask you if all the cars shipped from this section of the country, however, was not an average of three to eight or ten days' delay?

A. I had a few cars that arrived in five days,—cars that was set to the pier the fifth day after the bill of lading was signed, but the majority of my cars that I received from Van Buren were from seven to nine days on the road according to the bills of lading, to the time set to the wharf.

Q. Was that much longer than it should have been?

295 A. I think the contract was four days.

Q. The contract between the railroad company and growers?

A. Yes sir.

Q. And that is the time they should have put them in?

A. Yes sir, as I understand from the railroad officials they gauge the time that it required to go.

Q. Did I make a note on the book of the condition of these peaches in cold storage in Hoboken?

A. You had a book and were doing some marking. I supposed that was what you were doing. I made my notes just simply to satisfy myself, and what notes you made I don't know.

Q. You stated, I believe, that you had instructions from Payne to look after these cars?

A. I had been in New York several days before I got any instructions from Mr. Payne. I had saw some of the cars arriving that Adam Miller had before I got instructions to look at them. I just simply looked to see how they compared with the cars I had. I made no notation with regard to those cars at all until after I received instructions from Mr. Payne to look out for them.

Q. I will ask you if Adam Miller received \$539.00 for A. R. T. 8787, and \$441.00 for A. R. T. 9737, \$367.57 for A. R. T. 10640, and \$367.50 for A. R. T. 10756 and said to have arrived in 9089; \$367.57 for A. R. T. 8683; \$472.50 for A. R. T. 10875; \$294.00 for A. R. T. 9478; \$490.00 for A. R. T. 8711; \$472.50 for A. R. T. 10542; \$384.00 for A. R. T. 10052 and if that wouldn't have been a fine sale on that market for the condition in which the peaches arrived in?

A. As regards to what he got I don't know—

Q. I say, if he got that much?

296 A. If he received that much he done splendidly.

Q. You may state whether or not the Board of Health got after Adam Miller about those cars of peaches—The Greenwood cars,—the condition they were in and trying to sell them?

A. That inspector is employed by the Board of Health.

Q. And he instructs him to take them off if he catches the cars in bad condition?

A. He orders them off and not to be sold unless thoroughly repacked, for I had the same thing myself another season. I had to remove one car off the dock myself for his instructions.

Q. But if he wasn't around and didn't see you you would sell them if you could?

A. I had something like 200 crates sold before he caught me, and then moved the balance of the car up to James M. Sangerson and we repacked my car. Sometimes we could get one crate out of three and sometimes we got a crate out of two. But it generally took on an average of about three crates to make one good crate of merchantable peaches, especially the car that I was ordered to take off the dock.

Q. But in spite of the inspector when they were specked there and damaged, if they were not too rotten, he allowed them sold?

A. Yes sir.

Q. It had to be in how bad condition before they were ordered off?

A. The only experience I had was the one car he ordered me to

take off; some of them was black and moulded; as far as you could see in the car was a mass of rot and moulded condition. I was with my broker at the time and he ordered Mr. Lipman to remove that car at once.

297 Cross-examination.

By Mr. MILES:

Q. What time did you get to New York?

A. I couldn't tell you, Mr. Miles, the exact date, but it was somewhere about the 18th, I think, of July.

Q. How long do you think you had been there before you took any notice of any of these A. R. T. cars you have testified about?

A. I stayed in New York City—I think it was twelve days that I stayed in New York City. That is, I was there but I was over to Scranton for one or two days on account of having some cars over there.

Q. Scranton, Pennsylvania?

A. Yes sir.

Q. Who is this Mr. Payne?

A. He was representing some of the Crawford County growers.

Q. At his request you finally noticed some rotten peaches?

A. I took notes on them.

Q. You have testified only from those notes?

A. That is all.

Q. You have testified not from your actual notes?

A. No sir, only what I took notes for Mr. Payne give me instructions to look after the Greenwood interests.

Q. You were up there looking after the Crawford County interests?

A. Yes sir.

Q. After you had been there several days?

A. Yes, I don't know how many days.

Q. But you had seen peaches come in there from Greenwood prior to that?

298 A. Yes sir.

Q. How long prior?

A. I had seen them I suppose, three or four days before.

Q. You had seen Greenwood peaches come in A. R. T. cars some three or four days?

A. Yes sir.

Q. And before you noticed them to such an extent that you could testify about them?

A. Yes sir.

Q. Now when did you receive this wire from Mr. Payne? Where were these peaches when you first saw them?

A. They were each morning placed on pier 29.

Q. Now when peaches would be unloaded and resorted at Hoboken, would they then be brought over to pier 29?

A. They are not opened at Hoboken. The cars are not opened until they reach their destination, then they are broken open and then the longshoremen unload them.

Q. Don't you know it to be a fact that these cars were stopped over at Hoboken and resorted?

A. That was before my time. I don't know anything about that. He told me he had held some over there.

Q. And sorted them, didn't he?

A. I guess he sorted them.

Q. And you saw some of his men over at Hoboken sorting peaches in the cold storage?

A. Yes sir.

Q. After these peaches would be sorted at Hoboken could they be shipped over to New York?

A. They would be located over by express.

299 Q. They would be unloaded at pier 29?

A. I don't know.

Q. They would go to that dock?

A. I couldn't say which dock they would go to.

Q. Then if you saw rotten peaches on pier 29 in New York and peaches had been stopped or dumped and assorted at Hoboken, couldn't they have been peaches that were taken out?

A. Yes sir, it could have been done if there hadn't been much shortage but the number of the cars was reported and nearly every car I saw had from 448 to 500 crates, sometimes they loaded as many as 500 but it is generally 448, I think, was the average car.

Q. Now when did you first see these peaches that were on the pier? They were outside of any car?

A. Yes sir.

Q. You didn't see any car at all?

A. No sir.

Q. You saw no freight car whatever?

A. I did not.

Q. Were these peaches piled up there on the dock iced in any way?

A. No sir.

Q. They were just out there in the open?

A. The pier is covered.

Q. There is no way of refrigerating them?

A. No sir.

Q. Suppose peaches are put on that pier, from your knowledge of the situation there and a man holds them at such a high price that he can get no buyers for them until they would rot, don't the inspector tell them to remove them?

300 A. He can remove them. He has got to sell them or move them to his house.

Q. Then wouldn't the best way to work it be to sort the peaches at Hoboken if you were permitted to do that?

A. I don't think there would be any place to do that.

Q. Didn't you say you saw some cars in cold storage at Hoboken?

A. Yes sir.

Q. Then he had stopped some of these cars at Hoboken?

A. He had cold stored ten cars and the balance up in that cold storage plant.

Q. Was it located at Jersey City, N. J.



A. Yes sir.

Q. And they have to be ferried over to New York?

A. Yes sir.

Q. You say that you never saw any box cars at all but that you saw some little boards in front of these peaches with the number on them?

A. Every car is numbered.

Q. Then you took your numbers from these boards?

A. Yes sir.

Q. Did you see those boards tacked on those peaches?

A. I did not; it is done before I get in.

Q. You don't know who tacked them?

A. Of my own knowledge, no sir.

Q. You would only know who put them on those piles of peaches?

A. No sir.

Q. And you only identified cars 8787, 1065, 80875, 9478 and 10541 just from boards that you saw stuck on the piles of peaches?

A. Yes sir.

301 Q. Who led you up to these piles of peaches, Adam Miller?

A. No sir, I found them myself because I was doing business there and Mr. Adam Miller had a certain stand on the pier.

Q. Wasn't Adam Miller there?

A. He was there every time I was there.

Q. Every time you would go in he would go in?

A. Yes sir.

Q. And when you got to look at the peaches he was present?

A. He was present, yes sir.

Q. Those gates are opened at 12 o'clock and you are permitted to go in. Is there anybody there to prevent you from moving these boards?

A. —.

Q. Just answer my question, if you couldn't do it.

A. It would be very hard to do because the man that has charge of the — who is foreman of the pier furnishes him with a slip like— something on the order of a duplicate bill of lading of the car that he got and then he is with the car all the time.

Q. Is there anything to hinder you, only suppose you wanted to change the boards on these piles with the numbers on them?

A. I guess I could do it but I would be caught at it. I don't think anybody would try it.

Q. It might be done but you would undoubtedly be caught at it. What business would it be of theirs if you had taken your stuff, whose business would it be to catch you if you wanted to change the numbers yourself?

A. I couldn't answer that question very well.

Q. After you had paid your freight you could put up any board you wanted to?

302 Q. Provided you had the same size board and could write the same?

A. I guess it might be done.

Q. You could change numbers on the board?

A. That could be done.

Q. Didn't you just testify—10541 and Mr. Rowe asked you if it couldn't be 2, and you said those numbers were so you could hardly read it?

A. It is just a rough piece of board, of course. The one might have been run out with a little tail on it. I don't say it was.

Q. You say your estimate is about fifty, sixty and seventy-five per cent is just a guess?

A. It is the best I could average by looking at it.

Q. There was a stack of peaches—how high would they be?

A. About six crates I think.

Q. A crate is about four inches high, that would be about two feet high?

A. No, that would be about six or seven feet high. A man could reach to the top and get it down.

Q. Then how wide and how long would it be?

A. The length of it would be about something like a half a car or a little better.

Q. That would be 15 or 20 feet?

A. Something like that. It is in a square pile.

Q. About 15 or 20 feet and as high as an average man could reach?

A. Yes sir.

Q. So you arrived at your estimate by walking around and looking at it?

A. No sir, I got my estimate by seeing Adam Miller try-  
303 ing to sell them and tearing the piles down.

Q. A man would come in and want a hundred crates, you got your estimate from where Adam Miller tore them down?

A. Yes sir.

Q. You didn't see A. R. T. 9737?

A. Yes sir.

Q. You didn't see 8683 at all, did you?

A. I think not. I don't believe I have that number at all.

Q. You saw a placard up there with 69516 on it?

A. No. 19516.

Q. Who told you that that car was really car 10875?

A. Mr. Miller. I had got instructions of the number when Mr. Payne had give me the numbers of some of the cars and the car was due 10875, and I asked for it, and he says this was received in 19516.

Q. So he took you to a place where the number was 19516 and told you this was 10875 switched into another car?

A. Yes sir.

Q. And you got your estimate on 10875 and what he told you?

A. Yes sir.

Q. Then you took his word for that being that car?

A. Yes sir.

Q. Then you were looking for certain numbers up there?

A. After I received the numbers.

Q. And Mr. Miller knew what numbers you were looking after?

A. I asked him of course; also I could read it off the placard when I seen it.

Q. But you asked before you seen the placards?

A. No sir, I had no number such as that. I was looking at 10875.

Q. And he took you and showed you 19516?

A. Yes sir.

304 Q. And that you say, was practically worthless?

A. Yes sir, it was in very bad shape.

Q. Now after you had looked at these cars on the boards, what date was it that you looked, can you remember the date?

A. No sir, I can't give you the dates. I just made my little notes and left the number and went to the office and made a complete report to Mr. Payne. I had nothing to do with the Greenwood cars whatever.

Q. What do they do with these numbers when a carload of stuff is sold? Do they throw them in the river or burn them up?

A. I don't know sir. As soon as the car is moved I see the numbers being swept along with the trash. I suppose they go into the river.

Q. They are just treated as trash?

A. Yes sir.

Q. Suppose the car 8787 or 10640 were to come into the dock today in good condition, and some other car, A. R. T. or any car come into the dock tomorrow in poor condition, wouldn't it be possible for the men to take the numbers that were on the cars of the previous day and put them on the piles of the second day? Wouldn't it be possible?

A. I wouldn't think it would be.

Q. They just treat them as trash?

A. Yes sir, right out of the way.

Q. You say at Mr. Miller's request you went over to Jersey City?

A. Yes sir.

Q. Do you remember the name of the cold storage?

A. No sir, I do not, I didn't write it down.

Q. He took you in there and showed you some peaches which he said came from Greenwood?

305 A. Yes sir.

Q. How did he explain to you the fact that they were in storage and not on the pier?

A. He told us that he had stopped ten cars to be repacked and would try and get his freight out of them.

Q. And he took you around and showed you four of these cars?

A. Well, there were some others and they were F. G. E.

Q. You didn't see but four A. R. T.?

A. Yes sir.

Q. They were in cold storage over at Hoboken?

A. Yes sir.

Q. Who puts the placards on them?

A. I suppose the cold storage men.

Q. Cold storage men or Mr. Miller?

A. Mr. Miller couldn't do that.

Q. You mean you don't know whether he is there?

A. I couldn't say; it is possible that he wasn't.

Q. I am just trying to get you to come down to the questions. I asked you what Mr. Miller would do. He showed you these four cars over there?

A. Yes sir.

Q. They had numbers on them?

A. Yes sir.

Q. The same sort of boards they used on the docks?

A. Yes, but I think as near as I can remember they wouldn't all be one size. The boards on the dock are all the same length. They are cut by machinery I suppose.

Q. And you say these boards in the cold storage place were so rough that you could hardly read the numbers?

A. Some now and then that I couldn't.

306 Q. Do you know how long they had been in cold storage?

A. No sir; I don't remember that I heard him say.

Q. And he took you up and asked you to inspect these cars?

A. No sir.

Q. Mr. Rowe is his lawyer in this case?

A. I don't know whether he was Adam Miller's lawyer or not. I went along as a companion of Mr. Rowe.

Q. And Mr. Rowe as attorney took you along as a companion?

A. I don't know. He and I was up to Adam Miller's together. I had nothing special to do that day and I just was with Mr. Rowe as he was a plumb stranger in New York and that had once been my home and I was very well familiar with New York City. I was with Mr. Rowe kind of showing him around.

Q. And you went over to Hoboken where Mr. Adam Miller had these peaches stored?

A. Yes sir.

Q. And Adam Miller pointed out these peaches?

A. He had a section of the room. There was other stuff in the room that didn't belong to Adam Miller. He had a section of a very large room.

Q. That was the place where you saw these cars?

A. Yes sir.

Q. They were in cold storage?

A. Yes sir.

Q. And you don't know how long they had been there?

A. No sir.

Q. The boards had been placed on them and you don't know who placed them?

A. No sir.

Q. And you were requested to put the numbers down in a note book?

307 A. It wasn't necessary but I do know when I started in that Mr. Rowe was making *any* notes for I saw that he had his book. I made a few memorandums because I thought Mr. Payne

would want some information in regard to the cold storage proposition.

Q. You say these longshoremen over there unload those cars before twelve o'clock?

A. Yes sir.

Q. And they are unloaded and stacked on the dock before anybody else is turned in there?

A. Yes sir.

Q. Who owns that pier 29?

A. I don't know whether it is leased by some company or not.

Q. It is up there for freight shippers?

A. Yes sir.

Q. Or any broker that wants to come there?

A. Yes sir.

Q. Stuff that comes in by every other means of transportation in there uses that pier?

A. That is the pier for all grades of fruit.

Q. It might come up there in fruit steamers?

A. They might; yes sir.

Q. And you say they take charge of it and these longshoremen unload it?

A. Yes sir.

Q. Do you know who pays these longshormen?

A. I don't know.

Redirect examination.

By Mr. Rowe:

Q. Mr. Goldsmith, in addition to the card that it put up at  
308 each batch of peaches to show what car it is, I will ask you if on going into the dock 29, if there is not a bulletin board there that shows every car number and initials of the car, and what it is, and if a man cannot walk up there and see the car numbers?

A. There is a bulletin board there. I never paid any attention to it.

Q. By way of refreshing your memory I will ask you if, on the left of that main entrance if there is a bulletin board standing right here as you enter?

A. I think it is there but I tell you I never read it or paid any attention to that. As far as the gates go, there is several places to go in. Sometimes a fellow is so anxious to get in he goes in with the teams. If you can dodge a policeman at the gate and get in by a team, you go. And there is several thousand people that make a rush at 12 o'clock into the doors. I paid no attention to bulletin boards or anything else. I was just attending strictly to my own business and nothing else and the sights in New York wasn't very much to me. I wasn't looking for anyone only business.

Q. I will ask you if the dock master controlling that pier doesn't get those boards and put them up there himself at these different batches of peaches?

A. I couldn't tell you because they are there when you get in.

That is the way you get your right cars. The board is on there before you are allowed in.

Q. I will ask you if that bulletin board is at the ends of pier 29, if that don't make a duplicate of that card, one being on the bulletin board, and the other being on the batch of peaches?

A. The bulletin board is on the side by the office of the dock master, there is a narrow door that you go in on the right  
309 hand side as you come out by the dock master's office, and also another small door on the other side. As I say, I never stopped to notice it.

Q. I will ask you if the car numbers that are put on this bulletin board if a man could change it and not be caught up with?

A. I couldn't give you that because just as I say, they are up there when we get in there and if there is a bulletin board there with car numbers there I never read a one of them.

Q. I want to ask you if Adam Miller is a man that would change the numbers?

A. My opinion of Adam Miller is that he is an honorable man.

Q. I will ask you if you haven't since had him sell peaches for you?

A. Yes sir. I would consider him a very successful man. If I was going back and he was living, I would give him business.

Q. I will ask you if when I went to New York City I was representing the growers and you were representing Payne and if you and myself didn't go together and make these arrangements, and that agreement to pay a certain amount on these cars, and then whatever he recovered, he was to divide whatever he got?

A. Yes sir, our arrangements were that he paid you so much money and then gave you notes for ninety days, and so on; I don't remember the dates, but you came and asked me about it and I told you if Mr. Miller would give Mr. Greenwood on the notes to take them, and you studied a little bit and said you believed you would do it. Mr. Miller and I went in to Mr. Greenwood's office and Mr. Miller had the talk with Mr. Greenwood, and he decided to go on the notes for Mr. Miller to get the money for the cars of peaches from the  
association. Mr. Miller had agreed to pay them \$1.25 a crate.

310 Q. Didn't he pay \$1.25 a crate?

A. No sir.

Q. Did he employ Mr. Rowe as an attorney right then?

A. No sir; not that I heard.

Q. How long had you known Adam Miller? About four days hadn't you?

A. No, I met him and made his acquaintance before I was instructed to look after the peaches.

Q. Well, you hadn't known him over ten days?

A. No, I hadn't.

Mr. Rowe:

Q. I will ask you if after the agreement was made, if I didn't wire Mr. Cumbie who was representing the association, before I



would make any settlement, and if Mr. Cumbie didn't reply that I was on the ground and to do what was best about the matter?

A. I remember you showed his telegram and he advised you to make that settlement right then before he changed his mind, because that was a good one.

Q. Didn't Adam Miller tell us that he had those peaches put in cold storage there because his information from the railroad company was that they had arrived there rotten from Jersey City, and he put them in there to assort them and he wanted us to go over there and look at them?

A. I don't remember anything about his conference with the railroad. He said they were reported to him in bad condition and he had put them in cold storage to reassort them and repack them and for us to come over and see him.

Q. That is the four cars?

A. Four A. R. T. cars, the cars that he was repacking on,  
311 I don't know the numbers.

Q. I will ask you if those you saw on the cold storage didn't have the names of the growers?

A. Yes sir, some of them did.

Q. Such as R. C. Cumbie, Sanders, Caudle & Son, N. G. Cumbie and others?

A. Yes sir, there was Greenwood stencils on some of them.

#### Recross-examination:

Q. You say he had taken those numbers down on some of them?

A. Well, he had had men working.

Q. Your testimony as to the six car numbers that you have given are from notes that you took when Mr. Adam Miller was along and showed you these piles with the numbers?

A. He was working at them and I took my information just as I saw him. I just simply watched his proceedings when I had time.

Q. He would go to and from a car and walk back and forth?

A. Yes sir.

312 C. A. STARBIRD, Special Administrator of Adam Miller,  
Plaintiff,

vs.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, De-  
fendant.

C. A. STARBIRD, Special Administrator of Adam Miller, et al., Plain-  
tiffs,

vs.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, De-  
fendants.

Ten Cases Consolidated, Numbered from No. 39 to 48 Inclusive.

*Stipulations.*

It is hereby agreed between Robert A. Rowe, Attorney for Plain-  
tiff, and T. B. Pryor, Attorney for defendant, that the deposition  
of D. T. Goldsmith may be taken at his residence in shorthand and  
transcribed by Carrie E. Johnston, a stenographer. Signature and  
certificate waived, and all exceptions are reserved for irrelevancy,  
incompetency and immateriality.

D. T. GOLDSMITH, being duly sworn, testified as follows:

Direct by Mr. Rowe:

Q. Mr. Goldsmith, I desire to hand you your deposition taken  
at your residence some time ago, and ask if this is your signature,  
and have you examine the deposition and see whether or not it is  
the one you gave, and whether it is correct?

Mr. Pryor: Defendant objects on the ground that the question is  
leading and suggestive, and that the deposition itself is the best  
evidence.

A. Yes.

Q. You may state whether or not all those cars of peaches  
313 mentioned in your deposition heretofore taken were un-  
loaded by the Railway Company, and whether their dock  
master on Pier 29 examined those peaches and knew of the rotten  
condition in which they arrived?

Mr. Pryor: Defendant objects on the same grounds as above.

Q. I will ask the question this way. You may state what you  
know about what their dock master knew about their rotten con-  
dition on their arrival.

A. The railroad company placed the cars at the dock there, and  
they were unloaded by the long shoremen, and I suppose they are  
in the employ of the Pennsylvania Railway Co., and it would be  
impossible for them to unload peaches in the condition that those  
peaches were without knowing them to have been damaged for

the juice leaked out all over them when they unloaded them. Most all the cars I saw personally were leaking badly.

Mr. Pryor: Defendant objects to the plaintiff stating his suppositions with reference to the longshoremen being in the employ of the Penn. Ry. Co.

A. The Pier belongs to the Railway Company, that is my understanding.

Q. Do you know whether it was night or day when they unloaded those peaches?

A. They were unloaded some time between 4 P. M. and 12 midnight.

Q. By the Railroad men?

A. By the longshoremen. That is the name they go by there.

Q. Was the dock master there when the peaches were opened for inspection, and the cars opened to have the examination made?

Mr. Pryor: Defendant objects on the grounds that the question is leading and suggestive.

314 Q. State what you know about the dock master on Pier 29 knowing about the condition of the peaches in those cars mentioned in your direct examination?

A. The dock master stacks each car by itself, and the car from which the stock is taken is placed on a board and tacked on the stock. Sometimes their names is just written on the car number. That is, the car number and Adam Miller, that is all there is on it. Sometimes their names is not on it and they have to find it by just the number.

Q. Then the dock master saw and knew that these peaches were rotten?

A. Couldn't help it.

Mr. Pryor: Defendant objects for the same reasons and that he has answered the question two or three times.

A. Yes.

Cross-examination.

Mr. Pryor:

Q. Mr. Goldsmith, I want to ask you if you know of your own personal knowledge whether the pier 29 belongs to the Penn. Railway Co.?

A. No.

Q. I will ask you if you know of your own personal knowledge whether the longshoremen were in the employ of the Pennsylvania Railway Co.?

A. Couldn't swear it.

315-358 Redirect.

Mr. Rowe:

Q. That is where they were unloaded?

A. It is called Penn. Dock or Pier 29. I don't know whether the Pennsylvania owns its own road or not.

Witness excused.

Deposition bears endorsement on back as follows:

"Opened, filed and published this 11th day of February, 1914.  
A. HAYS, *Clerk.*"

\* \* \* \* \*

359

*Testimony of J. A. Barrett.*

J. A. BARRETT, a witness called for the plaintiff, being first duly sworn, testified as follows:

Direct examination:

Q. State your name to the court?

A. J. A. Barrett.

Q. Where do you live?

A. Van Buren.

Q. What business have you been engaged in here for a number of years?

A. Well, I was handling fruit in the summer and operated a compress in the winter.

Q. How many years have you been engaged in handling fruit?

A. Eighteen or twenty.

Q. Mr. Barrett, have you been shipping during this time, fruit to the different large towns throughout the United States?

A. Yes sir.

Q. Are you familiar with the different lengths of time that a car should be delivered after shipment to the various points to which they are sent?

A. Reasonably so.

Q. You may state if you know it, the time in which a shipment from Greenwood, Ark., or from Ft. Smith, Ark., either one, should be delivered at St. Joseph, Missouri?

A. Second morning delivery.

Q. The second morning after shipment?

A. Yes sir.

Q. Are you familiar with the time in which a shipment should be delivered at Mason City, Ia.?

A. It would be the third morning delivery.

360 Mr. Rowe: I am asking this in regard to the other cars now.

The Court: I understand.

Q. At Omaha, Nebraska?

A. The second morning.

Q. At Chicago, Illinois?

A. The third morning.

Q. At Cleveland, Ohio?

A. The fourth morning.

Q. At Toledo, Ohio?

A. The fourth morning.

Q. At Buffalo, New York?

A. The fourth morning.

Q. At Pittsburg, Pennsylvania?

A. The fourth morning.

Q. At Scranton, Pennsylvania?

A. About the fifth morning.

Q. At Philadelphia, Pennsylvania?

A. Fifth morning.

Q. New York City?

A. Fifth morning.

Q. At Baltimore, Maryland?

A. Fifth morning.

Q. Columbus, Ohio?

A. Fourth morning.

Q. Grand Rapids, Michigan?

A. Fourth morning.

Q. Denver, Colorado?

A. Fourth morning.

Q. At Detroit, Michigan?

A. The fourth morning.

361 Q. Mr. Barrett, you can state generally what methods are adopted in the shipment of perishable fruits to prevent their decay?

A. They are loaded in special equipment, an iced refrigerator car.

Q. Are you familiar with the different series used by the A. R. T. Company?

A. Yes sir.

Q. Now you may state in regard to the series—is there such a series known as the ten-thousand series?

A. Yes sir.

Q. What is their icing capacity?

A. About nine thousand pounds.

Q. Is there a series known as the nine-thousand series?

A. Yes sir.

Q. What, if you know, is their icing capacity?

A. They are not quite so much.

Q. Is there another series known as the eight thousand series?

A. Yes sir.

Q. What is their icing capacity?

A. To the best of my recollection it is a similar car and has a smaller ice chamber.

Q. Now Mr. Barrett, what would you say if cars were shipped from Greenwood, Arkansas, to these various destinations that I have mentioned, loaded in good sound merchantable condition, crates fairly well packed and properly iced, would you expect them to arrive at destination in as good condition as they were shipped out in?

A. The fruit being sound I would expect they would remain so.

Q. The purpose then, if I understand you, is to preserve  
362 the fruit?

A. Yes sir.

Q. In your opinion will it preserve the fruit in the journeys of which I have spoken if it carried in the time I have indicated and kept fairly well iced?

A. Yes sir, it has done it.

Q. Suppose a car was shipped from Greenwood, Arkansas, to some one of these different points which I have mentioned, and it was delayed on the road at some points along the road anywhere from one to three days, and on its arrival at destination it was found to have arrived in bad condition, more or less specked and more or less rotten, the specks and rotten being worse on top and at both ends; upon arrival at its destination it is found in the condition I have indicated with more or less rotten and more or less specked fruit, what in your opinion would or could produce that condition?

Defendant objects; objection overruled and defendant excepts.

A. I believe good sound peaches well iced should carry in cars where they had proper attention enroute from six to ten days, and in answer to your question that a delay of a car one day or two days or three days when it arrives specked on top or showing decay near the center of the load, that it has not been properly attended to in transit with ice.

Q. In your opinion, would that condition indicate that the car at some point in the shipment had got too warm?

A. Yes sir.

Q. What would cause it to get too warm in your opinion?

A. It might be a lack of ice or it might be improper ventilation of the car; might not be perfect in its refrigeration or ventilation.

Q. Do you know any other condition that would produce that condition in the fruit.

363 A. No sir.

Q. What would you say with proper attention whether it would get too warm or would properly refrigerate? In your opinion, would it get too warm or the refrigeration fail to work if it had proper attention?

A. I couldn't say for sure because some of these cars are—well, I would just answer the question by saying the car didn't have proper attention or it would refrigerate.

Q. Now, I will ask you in regard to this eight-thousand series. You have already said they capacity was small. I will ask you to tell the court whether in your opinion these eight thousand series have sufficient icing capacity to refrigerate cars of the capacity they load 490 crates in?

A. In my opinion, the ice bunkers are not sufficient to refrigerate the minimum load we are required to put into it.

Mr. Pryor: I want to object to that. There is no allegation in the complaint to that effect.



The Court: You may call attention to that in the argument. Whether you object to it at this time or not you can object to it in the argument.

Q. Mr. Barrett, have you investigated to know about the icing facilities on the roads from here to Chicago and from here to Cleveland, Ohio? What I want to get before the court is do they have icing facilities at each station along the route?

A. Not at each station.

Q. They are some distance apart?

A. Yes sir.

Q. One here at Van Buren?

A. Yes sir.

364 Q. And about how many between here and St. Louis?

A. During the last two or three years they have increased their facilities which was occasioned by a greater yield and a larger haul of the fruit industry in this country. I suppose they have about doubled it.

Q. About doubled what they were in 1907?

A. Yes sir.

Q. You have spoken about a delay here. Suppose that a car was delayed in transit from here to St. Joseph, Mo., what would be the routing of the car from here to St. Joseph?

A. It would be the Iron Mountain all the way.

Q. Would it go by way of Kansas City?

A. Yes sir.

Q. What would be the facilities for icing between here and Kansas City?

A. We reice the car before it leaves Van Buren; it is reiced at Coffeyville and reiced at Kansas City.

Q. Now how often had the car ought to be reiced to make sure that the car would refrigerate?

A. Once in every 24 hours.

Q. Is that the general order given by shippers?

A. It is to reice it at every station in that time. Reice it at Kansas City and reice it every 24 hours after leaving Kansas City. I couldn't swear to that.

Q. Is that your experience?

A. Yes sir.

Q. Suppose at some point along the road they didn't reice it, then what would be the effect?

A. The fruit would begin to deteriorate. If it was loaded  
365 to a minimum and extreme hot weather. Of course, you know, it would be like this: The weather might not be so hot and the ice melt as rapidly as when it was extremely hot and dry, if it was damp and sultry.

Q. What is your recollection of the weather as to being cool and cloudy the latter part of 1907?

A. It was very hot.

Q. It was very hot and dry?

A. Yes sir.

## Cross-examination.

Q. According to your testimony the car that leaves here the evening of the 24th at Greenwood and got to St. Joe the second morning was making a good return?

A. I don't know.

Q. This particular car, if it left Greenwood on the evening of the 24th and got to St. Joe on the second morning made a good run?

A. Yes, that is the schedule time.

Q. Then I will ask you if the car was diverted and still got there on the second morning, that was good time?

A. Yes sir, good time.

Q. I will ask you if diverting a shipment in transit does not some times cause a delay?

A. Some times; frequently.

Q. Mr. Barrett, in this eight-thousand series that you spoke of a moment ago, I will ask you if it isn't a fact that peaches in these cars did not carry to the east in good condition in some instances?

A. I don't know. 1907 was a big peach crop and we used a great many of those cars but I think I tried to have a stand-in  
366 with the railroad boys to get them to give me the nine and ten thousand cars. I might have used some. I couldn't say, I expect I did. I shipped about 300 cars loads. I had some trouble with all the cars, Frisco, Armours' and everything, and then we had a good many we did not have any trouble with.

Q. As far as the large shipments are concerned, the peach growing business on a large scale was in its inception?

A. The biggest we had ever had up to that time.

Q. Do you know what per cent increase over prior years it was?

A. Well, I presume it was in Crawford County.

Q. Isn't that true of the western portion of Arkansas?

A. I would just presume so; I couldn't swear it.

Q. You spoke about the peaches decaying. I will ask you if it wouldn't depend a good deal on the condition of the peaches, if peaches that were overripe would not be more subject to decay?

A. Well, if a peach had begun to decay ice would only tend to refrigerate it but it wouldn't stop the decay. If a peach isn't bruised it goes on up to perfection and then it begins to decay, and after it passes that point refrigeration won't stop it.

Q. And you stated that there was about a hundred per cent increase in the year 1907 in shipments over any former year in this country?

A. Yes sir.

Q. I will ask you if it doesn't take a man that has had considerable experience as far as being overripe is concerned, to determine that?

A. I don't think it takes an expert to tell that.

Q. It would take a man that is accustomed to handling peaches?

A. Yes sir.

367 Q. You would have to know whether that peach was in condition to stand shipment?

A. Yes sir, but let me say this a man in packing peaches would pack them just as soon as we consider they will ripen with a rich color on them.

Q. How long have you been in the peach business?

A. About eighteen or twenty years.

Q. You know a great deal more about it than you did?

A. Yes sir.

A. Eighteen or twenty years.

Q. Then it does take experience?

A. Yes sir.

Q. Take a man that has not been engaged in that business he is liable to make a mistake?

A. Yes sir.

Q. Are peaches like potatoes? If you get one rotten one in a crate will it have the effect of decaying the others?

A. I don't believe it would.

Q. You state that no amount of precautions will not stop the decay. Will it effect the other peaches in the crate?

A. In my opinion, a peach that starts to rot after picking from the tree may contaminate the other peaches, but where peaches are good sound peaches and where you happen to get one that is too ripe, I don't thin- so; one is a disease and the other is a case of one dying of old age.

Q. In 1907 the people were not up as well on peaches as they were in last year?

A. Those who had been in the business were.

Q. Take some people who had not been in the business  
368 they were not so well up?

A. I wouldn't think that with their experience they would be in position to judge, a man without experience would hardly be in position to judge unless he had been in the business or had given the subject some deep study.

Q. You spoke a while ago about the time that should be made. Was that based upon the time over the Iron Mountain from Greenwood, or were you figuring over the time from Van Buren over the Frisco?

A. Well, we have shipped peaches from here over the Iron Mountain but they beat the time in over the Frisco. The Frisco gets in there at 2 o'clock in the morning and the Iron Mountain gets in at 5 or 6 o'clock going around by Little Rock. That is my recollection of it at that time. That was the schedule we had, I believe.

Q. So then, if that is true, it would only make five or six hours difference at St. Louis?

A. It is my recollection that they both made the same train out east to Illinois.

Redirect examination:

Q. Your understanding was that there was a regular schedule time for a train to reach St. Louis?

A. Yes sir.

Witness excused.

369

*Testimony of R. C. Cumbie.*

R. C. CUMBIE, one of the plaintiffs, being first duly sworn, testified as follows:

Direct examination:

Q. You are the plaintiff in this case?

A. Yes sir.

Q. State what position if any, you held with the fruit growers in and around Greenwood in the year 1907?

A. I was shipping agent for the Greenwood Fruit Growers Association.

Q. You were not only shipping agent but you were a member of the association and arranged for the packing and shipping of this fruit?

A. Yes sir.

Q. You may tell the court what means you took to procure correct packing at Greenwood?

A. Mr. J. A. Taylor from New York City representing a firm there came to Greenwood for the purpose of buying peaches, but up to that time we had never packed our peaches as the New York people wanted them packed. We had been packing some and it seemed like he didn't care to buy them and he suggested that we hire some packers.

Defendant objects.

Q. Did you get them?

A. Yes sir; I think we got 12 or 15 men.

Q. They were expert packers?

A. Yes sir.

Q. Where did you get them from?

A. Some came from Georgia and some from Florida.

Q. Did you have them there at the beginning of the season?

A. Not there at the beginning. We had loaded a few cars.

370 Q. How many cars?

A. Not more than a dozen, we had only been loading a few days.

Q. Before the bulk of your crop was shipped you had these expert packers?

A. We distributed them out at the different packing places, one or two men to each place.

Q. Getting down to this particular car No. 8983. Have you your book here?

A. Yes sir, I have it.

Q. Examine your book and tell the court when that car was loaded if it was loaded at Greenwood?

A. This car was loaded and I went up there when it was shipped out. It was loaded on the day of the 24th. according to my book.

Q. You may state if you can whether these peaches were loaded

immediately in Greenwood from their arrival at the packing sheds, or whether they were held there some time waiting for a car.

A. My book shows they were held back for 16 hours for a car.

Q. These particular peaches were held 16 hours waiting for a car?

A. Yes sir.

Q. Are you acquainted with Mr. Carstarphen?

A. Yes sir.

Q. You may state whether you were acquainted with him in the summer of 1907?

A. Yes sir.

Q. State whether you and others of your association had any arrangement with Mr. Carstarphen in regard to the furnishing of cars at Greenwood, and state fully what it was?

A. Yes sir, we had an understanding with Mr. Carstarphen in regard to the handling of our peaches. I think he was down  
371 there two or three times. I talked with Mr. Carstarphen at least once or twice before we began to ship peaches. We wanted a fruit shed, we had no shed at the time, and Mr. Carstarphen thought it was rather late to begin to build a shed, and Mr. Carstarphen advised us that the proper thing to do would be to have plenty of iced cars on the ground so that when we hauled our peaches to the station we could just unload our peaches right into the car and it wouldn't be necessary to have a fruit shed.

Q. What promise did he make in regard to furnishing cars?

A. He stated he would furnish all the cars we wanted. We were to order the cars when we needed them.

Q. How long before you needed them?

A. Twenty-four hours.

Q. In regard to this car 8983, had you ordered cars more than twenty-four hours before you received that one?

A. I ordered cars at five o'clock each evening. Mr. Moore and myself talked with him in regard to that matter and his suggestion was that we order by five o'clock this evening for cars for tomorrow evening.

Q. Did you give that notice each day?

A. Yes sir.

Q. Did you receive cars on the 24th that you ordered the day before?

A. No sir.

Q. And that caused this sixteen hour delay in getting this car 8983?

A. Yes sir.

Q. Did you have any shed to keep these peaches in before this car arrived?

A. Nothing except the depot.

372 Q. Had the Georgia packers come there, these expert packers, before this car was packed?

A. Yes sir.

Q. This car was packed and inspected by them before it was accepted?

A. Yes sir.

Q. Is it your contention that these peaches were damaged before they left Greenwood on account of not getting cars?

A. No sir, I don't think they were damaged.

Q. Do you mean to tell the court that they were in good shipping condition when they left Greenwood?

A. I wasn't the proper party to examine the peaches—to inspect for that purpose, but I was there and I did see almost all of the peaches.

Q. Were you there on the day of the 24th?

A. I couldn't say; I don't think I was ever absent from Greenwood unless it was a part of one day. I had some business one day.

Q. You are the plaintiff in this case?

A. Yes sir.

Q. This car was billed to J. B. Payne at Kansas City?

A. Yes sir.

Q. Mr. Payne had no interest in them?

A. I think not.

Q. You didn't have this car of peaches sold when it was shipped?

A. I don't know about that.

Q. You knew Mr. Payne was not at Kansas City. Do you know whether or not Mr. Payne had found a purchaser for this particular car of peaches?

A. No. No.

Q. Did you notify Mr. Payne that you were shipping this car of peaches to him at Kansas City?

373 A. Yes sir; he instructed me where ship them.

Q. Do you know whether or not that this car of peaches was sold on the morning of the 26th?

A. I did not sell the peaches; my business was to bill the peaches to Van Buren.

Q. You have alleged in your complaint that they were sold to Craig-Barr Mercantile Company.

A. I don't know anything about that one way or the other.

Q. When you billed anything out it was not sold to anybody, was it?

A. My instructions was that part of the peaches were sold and part of them sent out on commission.

Q. You heard his testimony before?

A. He just agreed to handle them on a commission.

Q. And then you were to bill out to him?

A. That wasn't my business to find out what he was doing with the peaches.

Q. Was this particular car finally — to the Craig-Barr Mercantile Co. or was it handled by them on commission?

A. I don't know about that.

Q. I would like for you to tell the court whether you saw that particular car of peaches when it was loaded?

A. I wouldn't say about this particular car. I ordered the cars every day.

Q. I will ask you, Mr. Cumbie, if it isn't a fact that you came



there and ordered too few cars often and after our agent Mr. Rhodes wouldn't order a double amount of cars?

A. No.

Q. He never did increase the amount?

374 A. We might have increased the amount when we got behind a day; we might order ten cars for today and only get four or five, and then we would have to order more for tomorrow.

Q. I will ask you if you didn't tell Mr. Rhodes here, as far as the ordering of cars was concerned, that you would leave it to his judgment?

A. No, it would be a little strange if I would say a thing of that kind when that was my business, that was what I was there for.

Q. Mr. Carstarphen told you he would have cars there for you?

A. If I would order them by five o'clock.

Q. How many did you order on the 21st?

A. I couldn't say; I kept no record of that.

Q. The 22nd?

A. I don't know. I can tell you how many I loaded on the 24th and 23rd.

Q. The point I wanted to find out, the difference between the number of cars you ordered and the number of cars that were furnished.

A. I know that we ran out of cars frequently.

A. As far as this particular car was concerned I wouldn't say about that. It was almost a daily occasion after the first car was set out.

Q. I will ask you then if the question of whether you would have sufficient cars or not, did not obtain on the occasion of the peach growers as to furnishing peaches to load?

A. A number of times.

Q. I will ask you if they did not a number of times do that?

A. Why there wasn't a man in the world could tell.

Q. You could tell in the neighborhood of it?

375 A. We would estimate from today's work. I made it a point of inquiring of the growers as they would bring in their peaches, I would ask them "How many will you bring in tomorrow" and try to order cars accordingly.

Q. During this time these peaches came from a large area of country?

A. For several miles around.

Q. And you were engaged in looking after your own peaches?

A. Not any more than anybody else.

Q. You have testified before about this car business haven't you?

A. Yes, I think so.

Q. I will ask you if you knew on any particular day in advance how many peaches would be brought in by the individual growers next day?

A. I could inquire at first when we were only loading about one car load daily, but after we got to loading twelve to fifteen cars per

day it depended somewhat on the amount of help we could get to gather peaches and bring them in.

Q. I will ask you if you didn't on one occasion order eight cars for a certain day and if Mr. Rhodes did not go ahead and double that amount and order eighteen cars?

A. I don't think he did.

Q. I will ask you if there wasn't on certain days more cars than you had ordered?

A. If there was, it was caused by the other cars being delayed and there were two days' cars there. If the cars that were ordered for today didn't come until tomorrow, the cars for two days would all come together.

376 Q. I will ask you if on one occasion when you were loading six cars a day if there didn't show up 28 cars??

A. I am sure they didn't send us more cars than we ordered.

Q. If you have no record as to how many cars you ordered, it is guess work?

A. I wouldn't say that I ordered so many unless it was the first day and second day when we only loaded one car or two cars.

Q. These peaches that stayed over there for sixteen hours,—that waited for a car for sixteen hours, I will ask you whether that damaged the condition of the peaches or not?

A. Why, they might have been some riper.

The Court: The question he asks you now is what was the effect of the 16 hour delay before these peaches were put in the car.

A. They were riper of course. If there were no bruises and the peaches were not rotten and absolutely firm, they will get overripe and still not rot. These peaches of course were riper 16 hours after they were hauled there than when they were hauled there. That was an exceptional year for the carriage of peaches. We never had a better year. There was some set over there in a work shed for two weeks and did not rot.

Q. Mr. Cumbie, if I understand you to say then these peaches that had been packed for 16 hours and left there, when they were loaded in a car were not in a damaged condition?

A. I think not. I don't know of any peaches that were loaded in a damaged condition.

Q. You had no refrigerator in the shed where the peaches were loaded?

A. No, No.

Q. Who was your inspector?

A. Mr. Basinger.

377 Redirect examination:

Q. Isn't it a fact that you have shipped peaches a good many years since that?

A. Yes sir.

Q. Isn't it a fact that a day as time goes, fruit is less likely to carry?

A. Yes sir, of course.

Q. Your efforts at that time of your association, and still are, to

pack them at a certain state of ripeness and discard all in the orchard that are too ripe?

A. That is the rule.

Q. And you take them to the station in that condition?

A. Yes sir.

Q. Then there are bound to be some that would be just ripe?

A. Yes.

Q. Then I will ask you if some *one* of them would be just ripe and if they were to stand 16 hours, what would be the condition then?

A. They would be overripe.

Q. With reference to this particular day I will ask you if there were any public notice put up there?

A. There had been a notice put up but it had been before that.

Q. When was it put up?

A. It was put up on Sunday after we shipped away the first car.

Q. When was the first car shipped if you have a record of it?

A. On the 14th.

Q. Then it would be about the 21st?

A. It might have been Tuesday; either Monday or Tuesday.

Q. I will ask you to tell the court before that notice was put up whether you had difficulty in getting as many cars as you used?

A. No, we had been getting plenty of cars right up close to the time.

378 Q. Is there any particular thing that called your attention to the 23rd, that makes you recollect that you didn't get the cars you ordered on that day?

A. I don't believe we loaded any cars on the 23rd.

Q. Now, would you have loaded on the 23rd, if you had cars?

A. Well, we had peaches on the ground.

Q. Did you order some cars for the 23rd?

A. (Witness refers to record.) I see the 24th and 22nd but I don't see anything on the 23rd.

Q. But you had plenty of peaches there on the 23rd?

A. We might have loaded some on the 23rd, but I don't see any on my book for the 23rd.

Recross-examination:

Q. How many people contributed to the peaches that went into this car?

A. I don't remember the number of members we had in the association.

Q. I mean in this particular car?

A. Well, I could tell. I had a bookkeeper.

Q. A great many people shipped with you that were not members of the association?

A. Perhaps some few.

Q. But you can tell the court right now who shipped?

A. There were a great number of people. In some cars there were only a few people because some people loaded cars individually. In some instances there would be more.

## Redirect examination :

Q. Have you any record of the number of crates that went into this particular car?

A. Yes sir.

379 Q. What was the number?

A. 490 six basket crates.

## Cross-examination :

Q. What was your heaviest day of loading out there? Was it the 23rd or 24th, or when was it?

A. I see a good many loaded on the 20th. About six cars loaded on the 20th.

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*Testimony of J. B. Besinger.*

J. B. BESINGER, a witness called for the plaintiff, being first duly sworn, testified as follows:

## Direct examination :

Q. You may state where you live?

A. I live at the present time at Stigler, Okla.

Q. Where were you living in 1907?

A. Greenwood.

Q. You may state whether or not you were present during the fruit shipping season of 1907?

A. I was.

Q. Tell the court, please, whether you occupied any position with the Fruit Growers Association at Greenwood during that fruit season?

A. Well, I was the inspector at Greenwood during the season.

Q. Did you keep a record?

A. No sir.

Q. I will ask you to tell the court if you remember anything about car 8983?

A. No sir, I don't.

Q. Do you remember inspecting peaches on the 23rd?

A. I inspected all that was shipped from the first car to the last.

Q. Tell the court what kind of peaches you loaded to be shipped?

A. Well, we tried to keep out everything that would be overripe and at the beginning we had a right smart trouble with the packing at the fruit shed. We had no experienced packers and we had to have quite a lot of them repacked. After we got experienced packers we had no more trouble.

Q. About how many days was it before you got the experienced packers?

381 A. I can't call to mind; I don't think it was more than two or three days.

Q. Do you remember the day of the month before you commenced shipping?

A. No sir, I think it was about the 15th of August.

Q. You got those experienced packers along before the 23rd. Now you may state whether or not you say you packed peaches that were overripe. Waht did you do with peaches that were specked or rotten, or anything of that kind?

A. Throw them out.

Q. How did you inspect peaches, by opening the boxes or otherwise?

A. By taking the lid off.

Q. And looked at the peaches?

A. Yes sir.

Q. If the peaches were not sound and merchantable peaches, what did you do?

A. I had them to repack.

Q. Those that were overripe, what did you do?

A. Those that were too soft, I had them keep them out. We didn't have any trouble except on the beginning we didn't have any experienced packers. Along towards the last we had a few that was overripe on account of them having to lay there so long on account of cars.

Q. How do you mean? Not getting cars to load them in?

A. Yes sir.

Q. They laid there at the depot you mean?

A. Yes sir.

Q. How long did they lay there at the depot?

A. I couldn't state positively just how long. Sometimes  
382 we would get cars just as quick as we could load them, and maybe next day some one that wasn't looked for would be there again, I had to watch for that mighty close. If they got too ripe they hauled them away.

Q. Do you remember any time when they loaded there as much as sixteen or eighteen cars?

A. Yes sir; I couldn't specify, I never kept any record. Mr. Cumbie attended to that and my business was to watch for all the peaches that went into the car.

Q. What do you say as to the peaches that went into these cars? Were they good peaches or not?

A. Yes sir.

#### Cross-examination:

Q. How many inspectors did you have there?

A. Well, one; I was the only one, but all the loaders and also the checkers I told them to watch for anything and if they saw anything that I didn't get to see, to call my attention to it, if there was any thing that ought not to go in.

Q. What was the greatest number of cars that was shipped in any one day while you were inspector?

A. I couldn't tell you.

Q. As many as ten cars?

A. Oh no, I don't think there was ten cars.

Q. Never was ten cars shipped in any one day?

A. I couldn't say whether there was ten or more.

Q. Give the court some idea, was there as many as six?

A. Oh yes, there was six cars shipped. We shipped by day and night too. I didn't keep any record of it.

Q. Would there be as many as six cars or five cars?

A. I am satisfied there was an many as five cars shipped  
383 some days.

Q. There would be 490 crates in a car and five times that would be 2450 crates?

A. That would be in 24 hours; we loaded day and night almost.

Q. Would you be there at night?

A. Yes sir, I was there all the time there was any peaches.

Q. You didn't stay there during the whole season without a night's sleep?

A. There was about five days I think I got about three hours' sleep and out of four days and nights I never slept any.

Q. Now in 24 hours would be 1440 minutes. You say five cars would be 2450 crates. How long would it take you to examine a crate of peaches? Did you remove the lids?

A. No, not all of them. I generally stood at the car door and after examining them. I never taken the lid off all the crates, of course not.

Q. What per cent did you take the lid off of these six cars?

A. I did not have to take it off of so many.

Q. You state that you were the only inspector they had?

A. Yes sir, and any time they found anything—we had a checker at each car who kept a record of everything.

Q. The checker's business was merely to check the peaches brought there?

A. If he saw anything he called my attention to it and I went and examined it.

Q. So you relied on the checkers? You don't know whether they called your attention to it every time?

A. If they didn't they didn't do as I instructed them to do.

Q. Were the checkers working under you?

384 A. Yes sir.

Q. Who were your checkers?

A. W. B. W. Heartsill and we had a young man by the name of Little but I forgot his given name—Floyd Little.

Q. Where was he from? He wasn't Ed Little's son?

A. No sir, John Little's son.

Q. W. B. W. Heartsill and Floyd Little?

A. I believe that was all we had.

Q. How old was this boy Floyd Little?

A. No, I don't know; a young man.

Q. Do you know whether or not he had ever had any experience at all in handling peaches?

A. No sir.

Q. Do you know whether Squire Heartsill had ever had any experience in shipping or handling peaches?

A. No sir.



Q. Did you instruct these shippers who were without experience to remove the lids?

A. At any time there come in a wagon I generally went and got on it and usually those peaches on top were all right and then as they taken them out if they seen anything that wasn't right they called my attention and I would come and attend to it.

Q. You examined the top crates?

A. If I was on the ground I did.

Q. You would tell them if they discovered anything rotten to let you know?

A. Yes.

Q. How far did you instruct them with reference to taking the lids off the top of the cars?

385 A. They always waited for me to do that.

Q. How did you inspect?

A. When a car comes in if it is not properly packed or too ripe, you can see it plain. You don't have to tear the lid off and go into it.

Q. You could just tell by looking through the slats. How wide were those slats?

A. Some of them a half an inch and some three quarters.

Q. Was the top of the lid solid or not? Did those pieces come together?

A. Yes sir.

Q. These checkers that would check them in—they had to look through that crack?

A. They could pick them up and give them a shake.

Q. Would that bruise them up?

A. Not necessarily.

Q. I mean just shaking them, if they were anyways overripe, wouldn't that have a tendency to bruise them?

A. If they were not packed well it would.

Q. According to your testimony then you relied on these inexperienced checkers to judge of the quality of the fruit in your absence?

A. Yes, when I wasn't there.

Q. So really, John, there was a large per cent of this fruit that went into the cars that you don't know what the condition of it was?

A. No, I don't think so.

386 Q. What per cent of the fruit that was loaded there did you personally examine?

A. Which do you mean, take the lids off and look into them?

Q. Yes. The day that you shipped five cars, 2450 crates? out of the 2450 crates how many did you take the top off of and examine?

A. I couldn't hardly estimate how many I did take off. Of course the lids in the middle are not nailed down in the center. I could take my fingers and feel to see whether these peaches were too ripe.

Q. How much experience had you ever had before in packing peaches?

A. I shipped in 1906.

Q. How many cars did you ship?

A. A part of five cars.

Q. At that time where did you ship from?

A. Hackett.

Q. That was all the experience you had ever had?

A. All the experience I ever had myself. I had watched and taken instructions from Mr. Scott and Mr. Nickles. They give me more information about packing peaches than any other men.

Q. You say that some of the peaches were routed to Detroit on account of the cars not being ready for shipment?

A. Yes.

Q. How many of these?

A. I couldn't tell you that.

Q. Did they examine the peaches any?

A. Well they let them get a little bit overripe.

Q. They became overripe?

387 A. They were a little soft.

Q. But they were shipped anyway?

A. Not the ones that I thought was too bad. We generally had peaches enough to fill all these cars and if we had a few crates left over to be loaded the next day if any got overripe it would be the ones left out like today and would have to wait until tomorrow to go, and then I looked after and tried to keep them back out of the way and not let them get in.

Q. Did that occur very often, that you would have peaches to ship and no cars to ship in?

A. I don't know just what the date was; I couldn't remember the date that cars begin to slack. There was at one time there that we had cars enough to take care of the situation all the way through until—I believe it was about the time they gave notice that there was no more ice. After that we never had cars to put the peaches in as the peaches would arrive. Once in a while we would get one or two cars out but I don't know the date of that notice.

Q. You never kept any record of it at all?

A. No.

Q. That has been nearly seven years ago?

A. Yes sir.

Q. You are just testifying from memory?

A. Yes sir.

Q. How many peaches and to whom did they belong that were allowed to become worthless?

A. Why, I couldn't tell you who they belonged to.

Q. How many peaches that you refused to let go into the car because they had deteriorated to the point where they wouldn't pass your inspection?

388 A. I don't know what they done with them; usually they sold them there in town to some fellows to can.

Q. These particular peaches in car 8983 that we are trying at this time?

A. No sir.

Q. They had to wait until there was a car ready to ship them in?

A. No sir, I don't know.

Q. You don't know anything with reference to any particular car or any particular peaches that were delayed on account of cars, or

how many were rejected on account of the fact that they became over-ripe while waiting for cars?

A. No sir; I don't know.

Q. How many checkers that you say you delegated your authority to reject peaches that did not come up to the standard?

A. No, I have no idea.

Q. Was there any appreciable quantity at any time?

A. I couldn't tell anything about that. Sometimes they wouldn't have any whatever and some times three or four crates.

Q. And you don't know who they belonged to or what car they went into or anything about it?

A. No sir, I never kept any record of it at all.

Redirect examination:

Q. What do you say as to the inspectors usually keeping a record? Did they have an inspector to keep a record?

A. No sir.

Q. You may state to the court whether you examined some of the peaches from each car load?

389 A. I did.

Q. Did you examine them in any regular way or did you pick them out haphazard to ascertain if the peaches were in good shape?

A. As I stated a while ago, I would go and look at the peaches in a wagon and then I would go on to another wagon, and then I would try to be at the cars when they were taken out and be on the lookout there, and also would tell the checkers to be on the lookout and not let anything get in that was not good.

Q. And in that way do you think you could keep close track of what each man was doing?

A. I think I could, Yes sir.

Q. You opened some of the crates in each layer?

A. Not every time I wouldn't open a crate. If they didn't look all right then I would go and open up some of the lids.

Recross-examination:

Q. There would some times be two or three cars loaded at the same time, wouldn't there?

A. About two cars at a time.

Q. And they were loaded from different places and different farms and a different grade of peaches?

A. O yes.

Q. And it was impossible for you to examine them as they were putting them in there? They were putting them in as fast as the man doing the packing took them out?

A. Yes.

Witness excused.

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*Testimony of R. A. Rowe.*

R. A. ROWE, being first duly sworn, testified as follows:

Direct examination:

Q. Mr. Rowe, were you assisting in shipping of the peaches from Greenwood at the time this car 8983 and other cars were shipped from there?

A. Yes sir.

Q. I will ask you if you were there around the shipping cars and depot during the season?

A. Yes sir, nearly all the time except a few days, I believe, about the 17th, 18th and 19th, and maybe the 20th. I was at the Midland Valley depot. There were three cars loaded there. With that exception I was at the Iron Mountain depot during the season.

Q. You may state to the court whether you were there at any time when the notice spoken of by Mr. Cumbie was put up by the railroad co.?

A. Yes sir, I was there shortly after it was put up on the same day and took a copy of the notice.

Q. Were you there the same day?

A. Yes sir.

Q. Have you a copy of that notice?

A. Yes sir.

Q. You may produce it?

(Witness produces paper.)

Q. Is this a copy of the notice that you took?

A. Yes sir.

Q. You may read it.

"Notice to shippers of perishable goods.

An ice famine prevails in this state and this company is unable to obtain a supply of ice to ice perishable shipments, St. Louis, Iron Mountain & Southern Railway Co., L. W. Rhodes, Agent, 391 Greenwood, Arkansas, July 23, 1907, 11:25 A. M."

Q. Mr. Rowe, you may state your recollection as to whether you received any cars on the day that that notice was posted up?

A. My recollection is—I wouldn't be sure however, about that, that there were three cars. They had been waiting some time for cars and there were three cars came in that day.

Q. What is your recollection as to whether that was sufficient to supply the demand?

A. It was not sufficient.

Cross-examination:

Q. You say three cars did come in that day?

A. That is my recollection.

Q. Do you know how many cars had been ordered that day?

A. I was very close to Mr. Cumbie during the season and while

I don't know how many was ordered that day, I remember that he had enough ordered if his orders had been filled, to take care of the loading.

Q. I would like to know the relation between you and the fruit growers during 1907?

A. I was a member of the Fruit Growers' Association. I commenced growing peaches in '95 and had been connected with the shipping—Mr. Cumbie and I were pretty closely associated, in fact he requested me to do anything I could to help out.

Q. Isn't it a fact that the shippers were offered about the same as they could get by shipping them, and you told them it was to their best interest to ship the peaches?

A. I couldn't say what was told to them.

Q. You received a compensation from the Fruit Growers' Association for the handling of the peach crop?

A. No.

Q. You represented the fruit growers' association during the  
392 year 1907?

A. No I didn't represent them.

Q. I will ask you if you didn't advise with Mr. Cumbie and Captain Caudle about where to ship the stuff?

A. No sir. I advised with them but not where to ship, because when Mr. Payne was selected to handle this crop of peaches and Mr. Cumbie was selected there in Greenwood and he consigned it to Mr. Payne.

Q. You were a member of the Greenwood Fruit Growers Association?

A. Yes sir.

Q. And at the same time I will ask you if you wasn't in league with the produce and commission men at different places to have consignments of peaches sent to them?

A. No sir, and I didn't recommend a consignee to any man during that season.

Q. I will ask you if Adam Miller didn't pay you, or agree to pay you \$24.00 a car for every car of peaches you would consign to him?

A. No sir, he didn't, but he agreed to pay me that much for all I would buy for him.

Q. I will ask you if you didn't draw a draft on Adam Miller for \$147 while you were representing the fruit growers and if this doesn't show that your draft was for commission on six cars of peaches?

A. Yes sir, that is my draft that I drew and the agreement was I was in New York City and I wanted to find somebody there to sell peaches to, but I didn't see Adam Miller and he wrote me about the matter and he sent Mr. Taylor here to Greenwood and he came to buy and Adam Miller told me that if I would assist Taylor he would give me five cents a crate for every crate that I helped him  
393 buy and this draft was for that purpose.

Q. Then if I understand you correctly, while you were a member of the Greenwood Horticultural Association, you at the

same time represented Adam Miller and was to receive from him a commission.

A. I had a right to buy from the association, or any other man had a right to buy from them.

Q. Did you tell Mr. Cumbie or did you tell Mr. Caudle, or any other person of the association that you were to get \$24.50 covering that assistance to Adam Miller to make these purchases?

A. No.

Q. And your intention was to put this \$24.50 in your pocket and you were a member of the association?

A. Yes sir.

Q. You admit that you were trying to profit at the rate of \$24.50 a car.

A. I certainly was.

Q. And a member of the Greenwood Horticultural Association and representing Adam Miller?

A. I was.

Q. You were advising where to sell these peaches?

A. I never told a man where to sell them. Any offer that Adam Miller had to make I always told Mr. Cumbie and if he wanted to accept it he did.

Q. Did you tell Mr. Cumbie that you were to get \$147.00 out of this six cars of peaches?

A. No sir. I would have told them if they had asked.

Q. Wasn't you a member of the association?

A. Certainly, a member and representative is a different thing.

Q. I will ask you if you didn't allege in this complaint  
394 that you were manager of the Horticultural Association?

A. I was in 1906.

Q. I will ask you if you didn't allege in the complaint drawn by you that at the time these peaches were shipped by you that you were the manager of the Greenwood Horticultural Association?

A. The complaint will show for itself what is alleged?

Q. I will ask you now whether you were manager?

A. I was manager up until the time I was succeeded by Mr. Cumbie.

Q. I will ask you if you didn't allege in there in the complaint and if it isn't a fact, that you made a contract for the peach growers association with Mr. Carstarphen with reference to the furnishing of cars to ship these peaches?

A. Yes sir, we did. He was down there in the association and made a talk.

Q. I will ask you if you didn't draw this complaint and allege in it that the said R. C. Cumbie is Manager, J. T. Moore, N. G. Cumbie and R. A. Rowe as managers for themselves and as the agent for the said plaintiff, made and entered into an oral agreement with the said C. E. Carstarphen and the defendant?

A. My brother drew the complaint.

Q. It has been through the courts in this country and you have never challenged it?

A. I don't challenge it now.

Q. Then you were manager up to the time Mr. Cumbie was selected?

A. At the time these peaches were bought I was not manager then.

Q. Why didn't you tell Mr. Adam Miller that you didn't control the peaches and for him to buy from Mr. Cumbie?

395 A. Adam Miller bought these peaches from Cumbie and the peaches that he bought from Cumbie I was to be allowed \$24.00 a car on.

Q. I would like for you to tell the court why you were allowed \$24.50 a car by Adam Miller on peaches bought from Cumbie?

A. If I assisted Mr. Taylor I was to be allowed that.

Q. If you were assisting Mr. Taylor, in justice to your principal, Miller, it was your duty to get the peaches as cheap as you could?

A. Yes.

Q. Were you buying them from Mr. Cumbie?

A. Why certainly, Mr. Taylor bought them.

Q. So then, instead of working for the peach growers association you were absolutely acting as the agent and manager of Adam Miller down there?

A. I helped Mr. Taylor there but at that time I was not the representative of the Fruit Growers; Mr. Cumbie was the representative.

Q. Can you tell the court why Miller didn't purchase these peaches direct from Cumbie?

A. He bought through Mr. Taylor. Taylor bought all that was bought from Mr. Cumbie.

Q. What were you paid \$24.50 a car for?

A. To assist Mr. Taylor while he was there.

Q. Did you say anything to Mr. Cumbie about assisting Mr. Taylor?

A. I don't know whether I said anything to Mr. Cumbie or not. It was just with Mr. Cumbie about that. He was manager.

Q. Just to get it straight, in other words, Adam Miller was paying you \$24.50 to use your influence with the growers?

A. It was to assist Mr. Taylor.

396 Q. And then they had hired you then to work against the interests of the peach growers in that section?

A. No sir.

Q. What did you get the \$24.50 for?

A. To assist Mr. Taylor to buy peaches.

Q. I asked you if you didn't insist on the fruit growers shipping instead of selling on the track?

A. I never did. I always advocated selling for the money in hand.

Q. That is where you had an arrangement to get \$24.50 a car?

A. I would because I had rather sell for cash.

Q. You don't think they are honest—commission merchants?

A. I had rather sell for cash.

Q. And you were employed by people down there to buy peaches?

A. For cash only.

Q. Did you give the case?



A. He paid cash and he got from a quarter to fifty cents and a dollar a crate more on every crate in New York City.

Q. I will ask you if this same man didn't give his drafts and he bought six cars of peaches and drew a draft for \$612 on each car and they turned this draft down?

A. Yes sir, he bought a lot from Van Buren here and Mr. Barrett knocked off fifty cents a crate.

Q. Did that relieve him for his agent?

A. No, it didn't relieve him but it bursted Adam Miller.

Q. Where did you get that information?

A. I got it in New York City. I made a settlement for those six cars with him and that is my information that he never did recover. I know that he bought 16 or 20 cars from this place.

Q. Do you know that ice famine had any effect on delaying  
397 cars? Do you know as a matter of fact that that was a general letter and that Greenwood was excepted?

A. No sir, Greenwood was not excepted.

Q. But still you don't know how many cars were ordered did you?

A. I knew at the time I put in an order for 15 cars to help Mr. Cumbie out. He wasn't getting his orders filled. I put in an order for 15 more. I knew from his orders that if he could get them filled they would have taken care of it.

Q. Who did you order for?

A. For Mr. Cumbie.

Q. Then you were representing Cumbie and the peach growers association?

A. No sir.

Q. Who did you order those cars for?

A. Mr. Cumbie was their representative and he asked me to help.

Q. And you simply went there and ordered 15 to be billed out?

A. Yes sir.

Q. Do you know what date that was?

A. No sir, I don't know what date it was but I made the order al-right. I think it was on the dat- that the card was put up about the ice famine.

Q. Did you have 15 cars of peaches to load that day or the next day?

A. No sir Rhodes claimed that he didn't get the cars he ordered and I put in an order for that.

Q. How many peaches did you have to put in this 15 cars?

A. I don't know how many.

Q. And still you wanted to put the railroad company to that extra expense?

398 A. We would have paid the damage.

Q. Who would have paid it? You?

A. If it had been necessary.

Q. You were willing to order the 15. I didn't think you would claim that you ordered for the peach growers?

A. Yes sir, I thought they would be glad to get them.

Q. In addition to what they had ordered?

A. They were not getting theirs. I ordered the fifteen and wasn't intending that in lieu of all the orders, was the way I had it.

Redirect examination:

Q. As a matter of fact, you know that it would have been to their advantage if they had sold all their peaches for cash?

A. It would have been to their advantage now and would be then.

Q. You shipped quite a number of car loads yourself that year?

A. I think there was about seven that I shipped.

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DEFENDANT'S EVIDENCE.

*Deposition of J. S. Tustin.*

The deposition of J. S. TUSTIN, taken on the 28th day of June 1910, between the hours of 8 o'clock A. M. and 6 o'clock P. M. at the office of M. L. Richardson, in the City of Colorado Springs, Colorado, to be read in evidence in the above case.

Direct interrogatories:

Int. 1. Please state your name, age, residence and occupation?

A. My name is J. S. Tustin, I am 52 years of age, reside in the City of St. Louis and State of Missouri, and am Freight Claim Agent of the St. Louis, Iron Mountain & Southern Railway Company.

Int. 2. Were you in the employ of the St. Louis, Iron Mountain and Southern Railway Company during the year 1907? If so, in what capacity?

A. Yes, I was in the employ of the St. Louis, Iron Mountain and Southern Railway Company, in the year 1907 and was Freight Claim Agent of that Company.

Int. 3. If you state you were in the employ of the St. Louis, Iron Mountain and Southern Railway Company as Freight Claim Agent during the year 1907, then please state if you were acting as such agent at the time of the peach shipments involved in the above case?

A. Yes, I was.

Int. 4. Please state how long you have been in the service of the St. Louis, Iron Mountain & Southern Railway Company as Freight Claim Agent and what the duties of the Freight Claim Agent are?

A. I have been in the service of the St. Louis, Iron Mountain and Southern Railway Company as Freight Claim Agent since October, 1888. The duties of the position are various and include the investigation, adjustment and settlement of claims for loss, damage or overcharge on freight shipments.

Int. 5. Please state whether you have caused an investigation of the handling of the 35 cars of peaches embraced in the above suit to be made.

A. Yes.

Int. 6. Was any notice in writing served upon the delivering lines as to any claim for damages within 36 hours after the notice of the

arrival of the cars at destination, or at any other time by the consignee to the agent of the delivering line?

A. No.

Int. 7. Did you have any knowledge that the plaintiffs made any claim for damages until this suit was brought?

A. No. None whatever.

Int. 8. Please state what would have been the result if notice had been promptly served as provided by the bill of lading upon the agent of the delivering line in the customary way of handling such matters?

A. Investigation would have been made of the truth of the facts set forth in such notice.

Int. 9. Please state if you ascertained from the investigation made by you, if any was made, as to whether or not there were any exceptions made by the consignee as to the condition of the peaches?

A. No exceptions were made by the consignees as to the condition of the peaches.

Int. 10. Please state any other facts in connection with your investigation or within your knowledge concerning the subject matter of the above suit?

A. These peaches were received in due course of business by the St. Louis, Iron Mountain and Southern Railway Company, were transmitted over the lines of the St. Louis, Iron Mountain & Southern Railway Company and the Missouri Pacific Railway Company and delivered to consignees or connecting carriers, without exception, objection or protest of any kind and were believed to have been properly delivered until suit was filed against the St. Louis, Iron Mountain and Southern Railway Company in this case.

(Signed)

J. S. TUSTIN.

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*Testimony of C. E. Carstarphen.*

C. E. CARSTARPHEN, a witness called for the defendant, being first duly sworn, testified as follows:

**Direct examination:**

Q. You may state your name, age, residence and occupation.

A. C. E. Carstarphen.

Q. Are you of lawful age?

A. Lawful age, residence Ft. Smith, Commercial Freight Agent for the Iron Mountain Railroad.

Q. How long have you been connected with the Iron Mountain R. R.?

A. With the Iron Mountain 27 years.

Q. How long have you lived in Ft. Smith?

A. Twenty five.

Q. Are you acquainted with Mr. R. A. Rowe and Mr. J. D. Moore and this other gentleman? (Indicating.)

A. Why, yes, I am acquainted with Mr. Rowe and Mr. Cumbie.

Q. Mr. Carstarphen, it is alleged here that they had an oral agreement with you and L. W. Rhodes at Greenwood, Ark., in the

Spring of 1907? Has our road ever agreed to furnish all the necessary cars from that station? Was there any such agreement made between you and Cumbie?

A. As I remember that I learned here Mr. Cumbie being at the head of the fruit growers' association and called on him at his place in the country east of Greenwood early one morning. I don't remember just what was said at that time. It might have been that I stated at that time we would endeavor to furnish all equipment necessary. I know I had a conversation some time in regard to that, but I don't remember just where it was or when it was. At any rate there was an understanding of that kind that they would give us that business if we would take care of it in the way of cars, etc.

Q. Was there any way on earth that you could have  
403 known how many cars would be needed?

A. No way that I know of.

Q. You might get an estimate of the total number of cars for any particular day?

A. No, I don't suppose a man right on the ground could do that.

Q. Plaintiffs allege that this car of peaches was received at St. Joe in a damaged condition and that you knew it?

A. I absolutely had no knowledge of it whatever. Those things are not reported to me.

Q. Did you have any knowledge of claim for damages?

A. None whatever.

Q. When was your first knowledge that the peaches did not arrive in good condition, or that it was claimed that they did not arrive in good condition?

A. I remember when the suit was brought. I think that was the first knowledge I had of it.

#### Cross-examination :

Q. Mr. Carstarphen, at the time of this conversation do you remember that they told you that they would have 75 to a hundred cars of peaches loaded at Greenwood?

A. I don't remember. They probably told me though.

Q. You know as a matter of fact that they would have to be loaded within 13 or 14 days?

A. I would say thirty days. We generally figure the season lasting about that long. Some times it drags along.

Q. Was there anything said about building a shed out there?

A. A fruit shed?

Q. Yes.

A. Yes sir.

Q. What was it about that?

404 A. Well, the fruit growers decided they would have quite a number of cars of peaches and they would have to have a fruit shed to load them. I told them that I did not believe we could get around to it in time. I told them it was pretty late and I did not believe we could get it up in time and in the meantime to load their peaches right out of the wagon into the cars which is done at a

great many places. We have handled that business successfully at quite a number of points in that way.

405

*Testimony of L. W. Rhodes.*

L. W. RHODES, a witness called for the defendant, being first duly sworn, testified as follows:

Direct examination:

Q. Your name is L. W. Rhodes?

A. Yes sir.

Q. Where do you live?

A. Loraine, Texas.

Q. Were you living at Greenwood in 1907?

A. I was.

Q. What was your occupation at that time?

A. I was agent for the St. Louis, Iron Mountain & Southern Ry. Co.

Q. Do you remember the peaches that were shipped from there that season during the year 1907?

A. Yes sir.

Q. I wish you would go on in your own way and state to the court what the arrangement was and how you obtained cars for the shipment of peaches?

A. For the first day or two there was not many peaches shipped the first two or three days, and after that they began to come in pretty regular, so Mr. Cumbie who was handling the ordering of cars up to that time, and he would come in—after business got heavy he had lots to do—he come in to me and he says to me “I want you to help me look after the ordering of the cars, I want you to help me do this.” And I says, “All right, I will do the very best I can for you,” so after that—we were supposed to get our orders in at 5 o’clock—after that he would come in and say “How many cars have you ordered today” and I would tell him and if he thought desirable to order more cars I would order more. Lots of  
406 times I would order maybe double the cars and invariably we would have cars left over.

Q. Were there any peaches that were not shipped from there on account of no cars?

A. Only at one time I think there was one or maybe two cars of peaches stayed in the shed from Saturday evening to Sunday night.

Q. Do you remember when that was?

A. It was along—I suppose practically along at the last Sunday in the season.

Q. Had cars been ordered for those particular peaches?

A. No sir, no specific order to cover that shipment.

Q. So it was left to your judgment as much as to anybody else as to the number of cars to order?

A. Yes sir; probably there was more loading on that day than was expected and the cars fell short from the previous order.

Q. Do you remember Mr. Rowe ordering at one time 15 cars?

A. No sir, I don't.

Q. Did he ever order during that season?

A. He ordered one or maybe two cars during that season.

Q. Did he ever order 15 cars during that season?

A. No sir.

Q. I will ask you if he didn't come back afterwards, a day or two after that order?

A. Yes, he did. He says "Give me that order back and give me one of them cars" so I did and he only taken the car.

Q. There was introduced here a copy of a letter about an ice famine?

A. Yes sir.

Q. And you did receive such a letter?

A. Yes sir.

Q. Did that have any effect on that situation?

407 A. Yes sir.

Q. And that is customary, is it?

A. It was sent as a bulletin notice.

Q. It is alleged in the complaint here that these peaches were delivered at destination in a damaged condition and that you knew of it?

A. I had no way of knowing of it at all. I knew nothing of the condition of the fruit.

Q. Did you make a statement in regard to having knowledge to Mr. R. A. Rowe or anybody else about the peaches having been delivered at destination in bad condition?

A. No sir, none whatever.

Q. When was the first time you ever heard that there was any claim?

A. When I was summoned to report there at court on the first case. I left there in October after the season and I knew nothing of it until the first court.

#### Cross-examination:

Q. Did they load any cars at your station on the 23rd day of July?

A. I can't say as to the dates. We loaded practically every day from about the 10th to the last of July.

Q. That is, you loaded every day you had cars?

A. We loaded every day except one or two.

Q. You had a record in regard to the cars that were ordered from time to time?

A. Yes sir.

Q. And it could be shown by the records just how many cars were ordered?

A. Yes sir.

408 Q. You have not brought that record?

A. No sir.

Q. Isn't it a fact that several days they didn't get there?

A. No sir, I don't have any recollection of wagons waiting there for that purpose.

Q. Do you remember of Mr. Rowe coming in at one time and giving you a written order for 15 cars?

A. No sir, I don't.

Q. And your saying to him "If you are going to give a written order you will have to take your turn?" and his saying "I will take the order and tear it up then."

A. I will tell you the extent of that order. It was a regular order for one or two cars and I had six cars that was to be in that day. I told Mr. Rowe that as he had served that written order I would have to wait to fill that order. And Mr. Rowe waited until the next day to get the next car. It was either one or possibly two cars.

Redirect examination.

Q. I will ask you if there wasn't more cars delivered there by the railroad company during that shipping season that were ever ordered by Mr. Cumbie, Rowe or all of them together?

A. Yes sir; at one time there we had, I think 28 cars on the yard there and two cars was sent back to Lalla to load. They had more cars there at one time than they could load in two or three days.

Q. All those cars were iced?

A. Yes sir.

Recross-examination:

Q. Were they there on the 23rd of July?

A. I can't tell the dates.

Q. Will the records show?

A. Yes sir.

409 Q. You don't know of the records being here, do you?

A. No sir.

Defendant rests.

*Testimony of S. Caudle.*

S. CAUDLE, a witness called for the plaintiff, being first duly sworn, testified as follows:

Direct examination:

Q. Were you one of the men interested in these fruit shipments from Greenwood in 1907?

A. Yes sir.

Q. Were you there at the time the fruit was being loaded?

A. Yes sir.

Q. I will ask you to state whether, if you know, and if so, how many times wagons stayed there all night?

A. I was there two nights myself with peaches on the wagons.

Q. Do you remember anything about this 25th of July when this notice was put out, whether there was any cars or not?

A. I don't think there was any cars at all.



## Cross-examination:

Q. You say there was a time when peaches rotted on account of not having cars to load?

A. No sir.

Q. What became of them?

A. Loaded them on the car.

Q. They were damaged?

A. They were some overripe, yes sir.

Q. You brought a suit against the Iron Mountain Railroad for failing to —? You were a witness in another case?

A. Why, they lay there over night.

410 Q. You finally got a car?

A. Yes sir. We shipped a car, this car that I loaded individually the peaches were put right in the car.

Q. These other peaches that you say you had to wait for cars, were they shipped out? What became of those peaches?

A. They were shipped out.

Q. So you finally got a car to ship your peaches in?

A. Mr. Rhodes said the cars would be in at six o'clock and there was a string of wagons for 50 yards waiting. One woman stayed there all night with the men to load peaches.

Q. I believe that is the same character of testimony that you gave before in another case. You just testified that way before a jury and the trial resulted in a verdict for the railroad.

A. I don't remember it.

Q. You don't know of the case of Mr. N. G. Cumbie, J. L. Wright, N. P. Durden suing us because they didn't have cars and you testified just as you testified a moment ago. You remember the case?

A. The one we got judgment on?

Q. The one the jury returned a verdict for the railroad company?

A. Yes, I remember that. I think about the same testimony I told them I am telling it now.

Witness excused.

This was all the general evidence which was introduced in the case of R. C. Cumbie, and in addition thereto the following evidence was introduced:

411 *Testimony of R. A. Rowe.*

R. A. ROWE, a witness called for the plaintiff, being first duly sworn, testified as follows:

Four of these cars that were inspected by Mr. Young I was not associated in handling them specially and they went to Adam Miller and Mr. Cumbie sent six,—the other six mentioned, and Adam Miller bought three cars from the Midland Valley and this made ten—13 altogether, and he paid Payne for one car and a wire came to Mr. Taylor about the car arriving in bad condition, is my recollection.

Mr. Pryor: I object to any wire that came to Mr. Taylor.  
 The Court: That may be merely by way of explanation.  
 The defendant excepts.

The peaches were all bought by him at Greenwood and Mr. Taylor bought all of them and I assisted Mr. Taylor in buying and the bills of lading from the Iron Mountain, my understanding is all went in the name of L. A. Taylor who was Adam Miller's agent.

The Court: I thought we had already agreed about that a while ago.

A. Yes sir. And we didn't get pay—

The Court: What did they buy them for?

A. All these cars in this suit he bought at \$1.25.

Q. Six basket crates?

A. Yes sir; six basket crates. And my understanding is—I know Mr. Taylor said he didn't want anything but six basket crates. It is my understanding that the New York market used nothing but that, I talked to Mr. Cumbie and I told him I was going to see about these other cars and he wanted me to see about the six cars that he had sent. Mr. Caudle started with me and he came to Van Buren and he had on a pair of pants that he didn't want to wear and I gave him the money to get another pair, and he finally  
 412 backed out. And so I talked to Mr. Payne and he told me to look into his matter too, and he said Mr. Goldsmith was there. I don't know whether he told me where I would find him or not. Of course, he was in communication with him and I was when I got there I think it was on Saturday night, so Sunday morning I went down pretty early and I didn't find Mr. Goldsmith. I think he was staying with Mr. Lipman. And I saw Adam Miller but I never said anything to him on Sunday, I didn't introduce myself. I went down on Monday morning and Mr. Goldsmith and myself got together and we went and saw him and examined all the cars. It seems he hadn't disposed of all of them and he told us the damaged condition they arrived in and Mr. Goldsmith told me the situation. He had the numbers from Mr. J. B. Payne. I got Mr. Cumbie's numbers before I left here. I went down early Monday morning. The market opens there at one o'clock. They allow the dealers to go in at 12 and the purchasers may come in at one and as you go into the dock there is a large board here on the left and on that board you can tell all the property of the cars, whatever it is, canteloupes peaches or apples. It bears the numbers and initials of the cars on a big board, and where the car is unloaded and stacked them up, as well as I remember they run them up like a square, and somewhere I think, as well as I recollect, it seems to me at the left hand corner, standing on the dock facing Manhattan, I think the number appears up on the board and the initials and the number of the car is about right there. I never noticed about the consignee's name being on the card or not, but that is the way you find the car numbers, and that is the arrangement. These peaches that I saw that were opened there so the buyers could go there and look, and I went over the dock and looked at car after car, and peaches after peaches, and there

413 is a man in charge who is called the dock master. They are right there before your eyes. He is bound to know all about them. They are there before him and he is there in charge. It is impossible for a display to be made like it is made there without his knowing all about it. It is my understanding that they are taken over there just like Adam Miller said and like Mr. Goldsmith. I don't know whether they call them ladders—that is the way they go over. Mr. Adam Miller told me the situation and how they were rotten. Well, I was informed that they were rotten and Mr. Miller says I want you and Mr. Goldsmith to go over and see those in cold storage. I says "All right" and we all three went over there and saw the hands sorting. I never saw such a mess of peaches, your honor, in my life. It is a conservative estimate to say fifty per cent were rotten. I think it was the fifth day of August I was there.

Q. Fifth of what?

A. Fifth of August. At any rate if was the day before the contract was drawn up, whatever date the contract was drawn up. I thought may be I would get a settlement every day but when it came to a show down I thought whatever settlement we made we would get the cash on it, so me and Mr. Goldsmith, Mr. Goldsmith representing these parties for these ten cars—I was representing all and he was representing Payne on the six cars. So we drew up two contracts. I drew up a contract for the four as attorney, or trustee, or maybe just in my name. We finally agreed on 65 cents that he would pay that now and then he would bring suit and he would divide whatever amount he recovered. I signed the contract for the four cars, and then Goldsmith and myself signed it on the part of the growers for the six cars, and Adam Miller signed that. I didn't know whether that would be necessary or not, so I thought I would wire Mr. Cumbie. I wired Mr. Cumbie and told him what the proposition was, that is, I wired Mr. Cumbie or Payne. He 414 wired back and says "You are on the ground. I leave it up to you." I put it in the contract that this settlement was optional with them, and if they didn't want to ratify it, they had a right to repudiate it. When the 65 cents was agreed on I thought we were going to get that. That was a sort of disappointment to me. I didn't want to come back without it so he drew one note for half of it for thirty days, and then gave another one for 60 days with six per cent interest and I saw Dunn & Company's office on Broadway and stayed with them a while and talked with them about that note and it was their opinion that he would make it good; that was some consolation to me, and after being there a while, I had the notes back there when they were due and he paid the first one promptly. I think the other hung on just a few days but he paid both the notes. Mr. Miller impressed me as being a gentleman; that is the way he acted and impressed me. That is about all, I believe.

Cross-examination:

Q. You had been in the employ of Adam Miller at Greenwood, or

of Adam Miller's agent, for the purpose of influencing the farmers to ship to Adam Miller, were you not?

A. No sir; not for the purpose of influencing any farmer to ship to Mr. Miller. When he testified to that in his deposition he is wrong.

Q. You were to receive from him a commission to influence consignments to him?

A. No sir.

Q. Didn't you receive from him \$147 on six cars?

A. I think it was on five cars. I desire to——

Q. I will ask you if you didn't receive from him a commission on that car that he received at Greenwood?

415 A. Now he was to pay me five cents a crate and I received \$147. I think you will find out on the three Midland Valley cars and these four cars, you can figure on what was in there. I think that is what it will amount to.

Q. If he paid you five cents a crate for a commission and not for the purpose of influencing shippers to ship to him, for what purpose did he pay you the five cents a crate?

A. For the purpose of assisting Mr. Taylor.

Q. Mr. Taylor was there for the purpose of representing Adam Miller?

A. Yes sir.

Q. And he needed your assistance to purchase the peaches?

A. I don't know whether he needed them or not. He was willing to accept my services.

Q. And to pay you for them?

A. Yes sir.

Q. Then you became interested with Adam Miller in consideration of this five cents a crate, to influence sales?

A. Not influencing sales; the money is what talked. We just offered the money for the peaches.

Q. I understand you to say "We offered the men the money." You mean you and Taylor representatives of Adam Miller?

A. Yes.

Q. In buying peaches from which you received this commission was it not to the interests of your principal to buy them as cheap as possible?

A. Certainly it would be.

Q. Then you tried to buy from the farmers as cheap as you could for Adam Miller?

A. No sir; there was a certain price to offer, \$1.25; Taylor never tried to buy any any cheaper than that. We just offered the limit that the man wanted to pay.

416 Q. Well, when you got to New York City were you then representing Adam Miller or were you representing the peach growers' association?

A. I was representing the parties who had these cars.

Q. I will ask you if he didn't pay you while you were in New York City for your services \$147.00?

A. My recollection is that he couldn't pay me that at all and he

gave me a note for \$147 and afterwards paid the note. I think it was collected through the First National Bank.

Q. Then your commission was received from him in that way?

A. Yes sir.

Q. You stated that you were in New York and inspected these cars on August 5th?

A. I am not certain about the date. That is, we was in the cold storage. I don't know how many was in there.

Q. You made a note of it at the time when you were there, when you inspected them?

A. No sir, I don't think I did make a note of the date.

Q. Didn't you make a memorandum of the date at the time you were there?

A. I don't think I made any memorandum but the contract will show when I was there.

Q. You have the contract?

A. No sir; I haven't it here. It is at home.

Q. When did you leave Greenwood for New York City?

A. I don't know but it was right about the first of August. I believe it was the second of August. That is the best of my recollection.

Q. Did you leave Greenwood to go to New York City as you have testified to, before the cars of peaches had arrived there?

417 A. I couldn't say about that.

Q. According to Mr. Miller's testimony, they did not arrive until August 7th, you left before that?

A. My recollection is that I left the second day of August. I couldn't be positive but it was somewhere about that time.

Q. Why did you leave Greenwood to go to New York City at this time?

A. As I stated, to collect on these cars.

Q. The cars then were in New York City and you knew it?

A. I knew they had been shipped there; I knew they ought to be there.

Q. And you wrote that the payment of the drafts had been turned down?

A. I think I did.

Q. Before you ever went?

A. Yes sir.

Q. If the drafts had been paid you wouldn't have gone at all?

A. No sir, if they had been paid I would never have gone at all.

Q. You stated in Greenwood that it was to the interest of your principal to get the peaches as cheap as you could?

A. He made a price and he never tried to buy them for any less or any more.

Q. Didn't care whether you bought them for any less or any more?

A. I wouldn't have bought them for any more.

Q. The relation continued until you got to New York City and was dealing with him there?

A. No sir, it was all over.

Q. But you hadn't gotten your commission at that time?

A. No sir.

418 Q. You didn't get your commission until after the deal was finally closed with him?

A. No, I didn't get it until after that time.

Q. So he paid you five cents a crate for peaches that the growers only received 65 cents for?

A. Yes, I never got any commission on those Cumbie cars.

Q. Which were the Cumbie cars, do you know.

A. I don't know. I was entitled to it though on all of them.

Q. Isn't that your handwriting? "Commission on six cars as follows: A. R. T. 9737 \$24.50; A. R. T. 9478, \$24.50; A. R. T. 8711, \$24.50; A. R. T. 10640, \$24.50; A. R. T. 8683, \$24.50; total \$147.50.

A. That is correct.

Q. That is your handwriting?

A. Yes sir.

Q. Isn't that a part of the Cumbie cars?

A. Yes sir; part of that is the Cumbie cars. I was entitled to it on all of them.

Q. Now Mr. Rowe, those peaches in these cars that the numbers have just been read only brought finally 65 cents a crate for the grower?

A. They were sold for \$1.25.

Q. I mean finally that only 65 cents was realized?

A. That is all that has been collected on them.

Q. That is all that he agreed to pay?

A. No sir. Unless he paid one-half of this law suit, one-half of whatever he recovered.

Q. Now when you were making this contract with him up there whom were you representing at that time, the growers or Adam Miller?

A. The growers.

419 Q. But you accepted at that time knowing that he repudiated these drafts drawn on him, you accepted your commission?

A. Yes sir; certainly, it was the contract. I was entitled to it. I certainly did.

Q. You stated you got to New York Saturday night and that you saw Adam Miller on Sunday?

A. Yes, I think so; that is my recollection.

Q. But you wouldn't introduce yourself to Adam Miller?

A. I don't think I introduced myself. I don't know whether it was him I saw or not. I knew the next day I had seen him on Sunday. I may have seen him on Sunday.

Q. You say you went down to pier 29, did you observe there some peaches?

A. No, no; I didn't see any peaches at pier 29 at all. That is not of these peaches. I didn't see any of these peaches there at all.

Q. When did you see any of these peaches in the cold storage? How did you know they were these peaches?

A. The reason I knew they were these peaches I saw Sanford Caudle marked on them, and my recollection is I saw R. C. Cumbie and N. G. Cumbie.

Q. On all of the crates?

A. Not on all of the crates.

Q. How many of them?

A. I couldn't tell you.

Q. Do you know that they were the original peaches shipped in these crates?

A. Certainly, I would think they would be.

Q. Did you identify the peaches? Anybody could have kept these crates that they had come in and put other peaches in it.

A. They could have done it but they didn't look like they  
420 had come in recently.

Q. How many crates did you see with Mr. Caudle's name or Mr. Cumbie's name on them?

A. I couldn't state that. I never counted up to see.

Q. Mr. Miller was with you when you inspected these peaches?

A. Yes sir.

Q. Went along with you?

A. Yes sir.

Q. And he pointed them out to you?

A. Yes sir.

Q. How long had these peaches been in cold storage when you inspected them?

A. I couldn't answer that.

Q. Couldn't you give the court any sort of an idea?

A. No.

Q. Mr. Miller didn't tell you?

A. He may have told me but if he did I don't remember now.

Q. And you don't know how long they had been in there?

A. No.

Q. You state that the only way you had of identifying them except Adam Miller pointing them out to you, was simply the initials and number on the board?

A. Yes sir.

Q. How large was that board with the numbers shown on it?

A. In the cold storage?

Q. Yes sir.

A. I don't remember about the board in the cold storage. I didn't see any board there. I may have seen it and may have noticed it but I don't remember about that.

Q. Then you took Adam Miller's word when he pointed  
421 out these peaches?

A. The best I could tell, they looked like our peaches. And then the stencils in the pile I could recognize the names. I know that nobody could have put peaches in the boxes from the time we loaded them and look like that.

Q. I believe you stated that you didn't know how long they had been there?



A. No sir, I don't know.

Q. On pier 29 you say you saw peaches with boards on them?

A. Yes sir.

Q. How large were those boards?

A. I don't remember; it would be just guess work. To guess at it would think they might be anywhere from eight inches to a foot wide.

Q. And as Mr. Goldsmith says, they sweep them out and they could be used afterwards?

A. I suppose they would; I never saw any swept away. I don't know, in fact, I never saw any sweeping going on that I remember about.

Q. Mr. Rowe, Mr. Miller gave you no reason why he refused payment on the draft?

A. He didn't have the money. He said he had bought so many cars that came in from Van Buren.

Q. Didn't claim the peaches were received in a rotten condition?

A. He claimed they were rotten.

Q. And he turned the drafts down?

A. He couldn't get the money on them to pay for them.

Q. I want to ask you if these drafts are not in your handwriting, car 8683?

A. Yes sir.

422 Q. What is the date of that draft?

A. July 25th.

Q. You wouldn't draw a draft until you had purchased the stock?

A. I wouldn't think he would.

Q. I wish you would state to the court the date that draft was protested?

A. 31st day of July, A. D. 1907, is the date that appears out here.

Q. Now, I will ask you if this draft right here is not one of the drafts that was turned down?

A. Yes sir.

Q. And the date of that draft at Greenwood was July 25th. When was it protested?

A. The 31st of July, 1907.

Q. A. R. T. 9478, I will ask you to state the date when that draft was drawn in Greenwood?

A. The same date, July 25, 1907.

Q. When was that protested in New York City?

A. It bears date of July 31st, 1907.

Q. I hand you now draft that appears to be in payment of car A. R. T. 8711, I will ask you if the date of that isn't July 25?

A. Yes sir.

Q. I will ask you when that shows to have been protested in New York City?

A. It bears the same date, July 31, 1907.

Q. Car A. R. T. 9737, draft dated Greenwood, Ark., July 25, 1907; I will ask you to state when that draft appears to have been protested in New York City?

A. 31st of July, 1907.

Q. I now hand you your draft upon him for \$147.00 and ask you if you had bought the peaches at the time that was drawn?

A. I suppose so.

Q. And the peaches had been shipped?

423 A. I don't know; they may have been.

Q. You wouldn't draw on him before you bought the peaches?

A. No.

Q. I will ask you to state when that draft of yours was dated?

A. July 25, 1907.

Q. When was that protested in New York City?

A. July 31, 1907, is the date of the certificate of the Notary Public.

424

*Testimony of J. R. Rea.*

J. R. REA, a witness called for the plaintiff, being first duly sworn, testified as follows:

Direct examination:

Q. You have been to pier 29 in New York City?

A. Yes sir.

Q. Just state to the court the way that fruit is handled there; how it is handled at that dock?

A. At the time I was there handling fruit——

Q. Were you there in the year 1907?

A. No sir.

The Court: When were you there Mr. Rea?

A. In 1901.

The Court: Do you object?

The defendant objected.

The Court: All right; the objection is sustained. I may be wrong but you can save an exception.

Q. Mr. Rea I want to ask you about the Railroad companies requiring receipts in receiving stuff?

Mr. Pryor: When was that Mr. Rowe?

A. Any time.

Mr. Pryor: The defendant objects, if your honor pleases.

The Court: You needn't answer that.

425

*Testimony of R. C. Cumbie.*

R. C. CUMBIE, a witness called for the plaintiff, being first duly sworn, testified as follows:

Direct examination:

Q. I want you to state whether or not I got in my dealings about this peach business, here before the court, a commission for buying

peaches—if that wasn't understood between a good many of the growers, and if you didn't understand the situation?

Mr. Pryor: The defendant objects.  
Overruled.

A. I don't know as I know what Mr. Rowe wants.

Q. My connection with Adam Miller in handling the stuff?

A. I know that I was there from the beginning of the deal to the close, and I think Mr. Rowe was there. Mr. Taylor was there before we commenced and waited until the packers came. And Mr. Miller represented all the time that his firm bought peaches and that is what we wanted. We wanted to sell, we didn't want to consign. We gave Mr. Taylor the assurance that if he would stay there he could do business with us. We rather begged Mr. Taylor to stay with us. I don't know nor didn't know until this case has been in progress that Mr. Rowe had anything to do with the business so far as agent was concerned. I had peaches there just the same as other people did and I was interested in my peaches and Mr. Rowe never did from the beginning to the close come to me and say that he wanted any cars consigned. I knew that Mr. Rowe was buying some peaches and did buy some peaches, bought some peaches from some of these men. I never knew that he was trying to do any business for Adam Miller.

Q. By way of refreshing your memory I will ask you if before Taylor came there if I didn't see you on the street there right about in front of — store and told you I had a wire from Adam Miller that he wanted some peaches at \$1.75, and that I spoke to you about that?

A. I remember something about that; I couldn't say positive where it was.

Q. You remember something about it?

A. I remember something about you speaking to me.

Q. I will ask you if I didn't do all I could during that peach season,—if I didn't offer my services to do whatever I could do?

Mr. Pryor: The defendant objects. Overruled.

A. Mr. Rowe did. I went to Mr. Rowe because he had had some experience in shipping and I felt the responsibility. I did solicit Mr. Rowe to advise me in regard to the business and he took pains to do so. I thought he was doing it as a friend and I received it as such.

J. D. MOORE, a witness called for the plaintiff, being first duly sworn, testified as follows:

Direct examination:

Q. Mr. Moore, what position did you hold there with the fruit growing people?

A. Well, I don't know, Brother Rowe. First I am President or was president last season of what you call the Fruit Growers' Association at Greenwood.

Q. How long have you been president?

A. Two years. I don't remember whether it has been two years or just last shipping season and up to this present time.

Q. I will ask you if it has not been our policy there as fruit growers to have cash buyers from the time we commenced shipping peaches?

A. I always preferred sales on the ground.

427 Q. I will ask you if I done what I could in that direction in my connection with the season of 1907?

A. I will say that you always advised me whenever I had anything to do with the peaches, that sales on the ground were better.

Q. Did I ever try to get you to consign peaches or anything else to people on commission?

A. Never did, that I remember.

Q. I offered to buy peaches from you in 1907?

A. You did buy one load in 1907, one wagon load of 6 basket crates in 1907.

Q. I will ask you when you were president, if I have always been a member of the Association and if I have not always cheerfully and willingly rendered you whatever assistance I could in the matter?

A. Yes sir.

Q. I will ask you if on one occasion there hadn't been nearly half the crop consigned when I was in court busy, and if we didn't sell the others for cash from then on instead of consigning, and then I helped collect the others?

A. There has been several times that you assisted; I don't know just what it is now you refer to.

Q. I say the time that I was busy in court half the season——

A. Yes sir; we sold the larger part of the season as consigned.

Q. I will ask you if I wasn't unwilling for the stuff to go that way?

A. Yes sir.

428 *Testimony of N. G. Cumbie.*

N. G. CUMBIE, a witness called for the plaintiff, being first duly sworn, testified as follows:

Direct examination:

Q. You can just state whether I have been wanting stuff consigned to any commission men, and if I haven't always been for cash sales and have assisted the people also, and if I have not always advocated cash sales?

A. That is my understanding; yes sir.

Plaintiff rests.

#### DEFENDANT'S EVIDENCE.

Whereupon, the defendant in order to maintain the issues upon its part, introduced the deposition of Malcolm Townsend on the 20th day of June, 1913, before Maurice Hotchner, Notary Public, at No. 80 Maiden Lane, New York City.

(Here the clerk will copy deposition of Malcolm Townsend.)

*Deposition of Malcom Townsend.*

The deposition of MALCOLM TOWNSEND, Agent for the Pennsylvania Railroad Co., in the City of New York, was read in evidence on behalf of the defendant as follows:

Int. No. 1. Please state your name, age, address and occupation.

Ans. to Int. No. 1. Malcolm Townsend, 65 years of age, address No. 51 West 81st Street, Manhattan Borough, New York City, occupation is Freight Agent of Pennsylvania Railroad Co., at Piers Nos. 4 and 5, North River, New York City.

Int. No. 2. Please state what was your occupation and where you were located during the year 1907?

Ans. to Int. No. 2. Agent of Pennsylvania Railroad Co. Piers Nos. 27, 28 and 29, North River, New York City.

Int. No. 3. If in answer to direct interrogatory No. 2 you state that you were agent for the Pennsylvania Railroad Co. in the year 1907, and that you lived in the City of New York, please state if you were the agent of the Pennsylvania Railroad Co. in New York City during the months of July and August, 1907.

Ans. to Int. No. 3. Yes.

Int. No. 4. Please state if you were personally acquainted with Adam Miller a commission merchant in the city of New York during the year 1907?

Ans. to Int. No. 4. Yes.

Int. No. 5. Please state if you had any knowledge or information of ten cars of peaches being received in the City of New York or delivered to the Merchants Refrigerating Co. in Jersey City, N. J. during the months of July and August, 1907.

Ans. to Int. No. 5. I know that the ten cars mentioned in Interrogatory No. 6 were consigned to Adam Miller at New York City, and I know that of such ten cars the following cars, viz.,  
430 10640, 8683, 10542 and 10052, arrived and were delivered to consignee from Piers 27, 28 and 29 in New York City. It must be understood that in referring to Piers Nos. 27, 28 and 29, that these piers together constitute one station under my jurisdiction as agent at that time. This includes bulkhead.

The remainder of said ten cars, viz., 8787, 9737, 9089 or 10756, (the latter being a transferred en route car), 9478 and 8711, were not unloaded and delivered to consignee at New York City, but were held at Jersey City on order of Adam Miller, filed with me in due course, for delivery to the Merchants Refrigerating Company. The above occurred in July and August, 1907.

Int. No. 6. Please refer to your records and state whether A. R. T. cars Nos. 8787, 9737, 10640, 9089 or 10756, 8683, 10875, 9478, 8711, 10542 and 10052 were received either at Jersey City, N. J. or New York consigned to Adam Miller, New York City, and how many and the numbers of the cars that were delivered to the Merchants Refrigerating Co., if any?

Ans. to Int. No. 6. My answer to this is included in my answer to previous interrogatory.

Int. No. 7. If you state that there were any of these cars of peaches delivered to the Merchants Refrigerating Co., please state if such deliveries were made on the order of Adam Miller the consignee?

Ans. to Int. No. 7. My answer to this is included in my answer to Interrogatory No. 5.

Int. No. 8. Please state if any notice in writing was served upon you by Adam Miller as to any claim for damages arising out of the shipment of these cars of peaches?

Ans. to Int. No. 8. No.

431 Int. No. 9. Please state whether the cars were received without exceptions from Adam Miller & Company, and if you have in your possession the receipts from him or from the Merchants Refrigerating Co. please attach same to your deposition and have them marked exhibit A.

Ans. to Int. No. 9. Yes, I have on file in my office the original receipts from Adam Miller showing he received in New York without exception, contents of the five cars mentioned in my reply to Interrogatory No. 5 as having been unloaded and delivered to him in New York; but the rules of the Company forbid my permitting such original receipt to leave our files, and so I am unable to attach them hereto.

Int. No. 10. Please state whether you had any personal knowledge that these peaches were received in a damaged condition, or of any claim for damages on the part of Adam Miller.

Ans. to Int. No. 10. I never had any knowledge that these peaches were received by Adam Miller in a damaged condition, and never knew that he claimed they were received in a damaged condition.

Int. No. 11. Please state when Adam Miller died, if you know the date of his death?

Ans. to Int. No. 11. I do not know.

Int. No. 12. Please state if you ever received any knowledge either directly or indirectly of any claim for damages on the part of Adam Miller until after the institution of this suit?

Ans. to Int. No. 12. No.

Int. No. 13. Please state any other fact that you may know with reference to the shipment of the ten cars of peaches and their delivery to Adam Miller or the Merchants Refrigerating Co. not covered by the above interrogatories addressed to you.

432 Ans. to Int. No. 13. When the peaches were unloaded by the railroad from the cars (the original cars) on the piers in New York City, they were put in Mr. Miller's particular section on the pier, and from that time they were under the exclusive jurisdiction of the consignee (Mr. Miller) and he inspected, examined, sorted and distributed them as much as he pleased,—the railroad offering no interference whatever, that section of Mr. Miller's being virtually his own store or warehouse.

The dock foreman was not the agent of the Pennsylvania Railroad in any sense of the word; if any complaint of any kind as to

the condition of the peaches had been made by Adam Miller or his representatives, it certainly would have come to me, and I can state that *so shen* complainant ever reached me.

Cross-interrogatories:

Int. No. 1. State the number of the pier owned by the Pennsylvania Railroad Company where they unloaded their cars of peaches during the year, 1907?

Ans. to Cross-int. No. 1. Consolidated Piers Nos. 27, 28 and 29, constituting one freight station.

Int. No. 2. State the number of your residence and on what street you resided, during the months of July and August, 1907?

Ans. No. 2. No. 51 West 81st Street, New York.

Int. No. 3. State particular- what agent you were, if any of the Pennsylvania Railroad Co., in 1907 and your duties?

Ans. No. 3. Freight agent in charge of the above piers.

Int. No. 4. State the location of your office, or place of business, if you were the agent of the Pennsylvania Railroad Co., giving number of building and street, where you were located and give distance from pier 29, and also give the distance from the Merchants Refrigerating Company?

433 Ans. No. 4. The office and place of business was on the piers, the Pier number being in lieu of a street number. My office and place of business on Piers 27, 28 and 29 was about a mile and quarter away from the Merchants Refrigerating Co., the Hudson River between.

Int. No. 5. If there is any body of water between your place of business in 1907, or residence where you were residing, and the Merchants Refrigerating Co. in Jersey City, N. J. state what body of water it was and how wide?

Ans. No. 5. Answered in reply to Cross interrogatory No. 4.

Int. No. 6. State the name of the agent, or dock master of the Pennsylvania Railroad Company and give his address, who was in charge of Pier 29 during the months of July and August, 1907?

Ans. No. 6. I was the agent.

Int. No. 7. State the capacity of the Merchants Refrigerating Co. and on what railroad it is located and how do they transfer the peaches from the cars that are placed in cold storage?

Ans. No. 7. I cannot state the exact capacity of the terminal warehouse of the Merchants Refrigerating Co., but I know it is one of the largest in this vicinity. It is located on the line of the Pennsylvania Railroad. I do not know their method of transferring the peaches, as I have never been in their warehouse.

Int. No. 8. Who unloaded those cars of peaches that were placed with the Merchants Refrigerating Co.?

Ans. No. 8. I do not know.

Int. No. 9. How many cars of peaches did the Merchants Refrigerating Co. have in storage in July and August, 1907?

Ans. No. 9. I do not know.

Int. No. 10. You may state if you know the capacity of their business and building?



434      Ans. No. 10. I do not know.

Int. No. 11. Give the date when those cars were placed in the Merchants Refrigerating Co. and when they were taken out?

Ans. No. 11. I do not know.

Int. No. 12. Did you see the employees of Adam Miller assorting those cars in the Merchants Refrigerating Co. in August, 1907? If so, state how many hands he had assorting peaches taking the rotten ones out?

Ans. No. 12. I did not see them.

Int. No. 13. How many employees had the Pennsylvania Railroad on Pier 29 during the months of July and August, 1907?

Ans. No. 13. There were between 500 and 600 employees.

Int. No. 14. Which side of the river did the Pennsylvania Railroad tracks run to in 1907?

Ans. No. 14. The tracks themselves ended on the western bank of the Hudson River, at which shore the cars unopened and intact were placed on disjointed rails and thus run on to floats and floated across the Hudson River to Piers 27, 28 and 29 and again untouched and intact and unopened were placed at the piers, and then at the proper time the contents were unloaded and placed at the disposal of the consignee in his section or temporary store.

Int. No. 15. How did they convey peaches from the end- of these tracks to pier 29 and who unloaded them?

Ans. No. 15. I gave the information in my previous reply.

Int. No. 16. What time did the peach market open in the morning at pier 29 during the months of July and August, 1907, and how did they arrange each car of peaches and designate it so it could be known and who did this, so that the consignee, or his agent could sell the peaches and showe them to buyers?

435      Ans. No. 16. The Fruit & Produce Trade Asso. selected 1 A. M. as the hour when all peaches must be unloaded and placed in the particular section of the particular consignee, so advising the Pennsylvania Railroad.

The contents of the cars were unloaded and placed in that part of each consignee's section as directed by the assorters and salesmen of each particular consignee, the laborers of the Pennsylvania Railroad acting under such instructions.

Int. No. 17. Does your company require a receipt from the *consignee* before you deliver the car of peaches to him?

Ans. No. 17. We do not demand a receipt as soon as the goods are delivered to the particular section of each consignee; the receipt is not demanded until after the consignee has had all the opportunity he wishes to assort and inspect the goods and make complaint, if any, to the railroad. The receipt is not demanded, in other words, until the consignee has made sale of the goods to his customers and they are being taken away from the piers by such customers or by the trucks of the consignee.

Int. No. 18. Did you see any of those cars of peaches in the Merchants Refrigerating Co.'s building on pier 29 or elsewhere?

Ans. No. 18. The Merchants Refrigerating Co. building is not on pier 29, or any of the Pennsylvania Railroad Co. piers, but is

across the river from such piers, as previously stated. I could not see them, therefore, in the Merchant Co.'s building, and I cannot now recall whether I saw these particular cars at our piers.

Int. No. 19. Did you know that Adam Miller could have made from fifty cents to one dollar per crate net, on every one of these cars of peaches if they had arrived sound and firm and that on account of them arriving in bad condition after buying three cars he quit buying, notwithstanding the fact that he had L. A. Taylor, his agent at Greenwood, Arkansas, buying for him and that  
436 Adam Miller, both wrote and wired that those peaches were arriving in New York City rotten?

Ans. No. 19. I do not know.

Int. No. 20. Did you know that Adam Miller claimed damages for those rotten peaches and that the peaches were arriving in New York City rotten, that were received from the Iron Mountain railroad, and that the Board of Health got after the Railroad Company and the merchants on account of rotten peaches?

Ans. No. 20. I never knew of any consignment of rotten peaches from the Iron Mountain Road, and never knew that these particular peaches were rotten, and never knew that Adam Miller claimed they were rotten; and I would have known if they had been rotten, and I would have known quickly from Adam Miller if he found they were rotten or claimed they were rotten. He never so claimed they were rotten. I know that these peaches were never the subject of a complaint or a seizure by any Board of Health while in the possession of the railroad, and I never heard of any seizure of these peaches while in anybody's possession.

Int. No. 21. Did you know that Adam Miller was informed that the initial carrier was liable for the damages to the peaches and that the suit should be brought here?

Ans. No. 21. No.

Int. No. 22. Have you talked with any person about — your testimony should be in this case, have you received any letter, telegram or has your answer to the direct interrogatories been prepared before you answered these interrogatories, if so attach the letter, telegram and your answers, if they have been prepared before you answer the direct interrogatories before the officer and make them exhibits to your deposition.

437 Ans. No. 22. I haven't received any telegram or letters about my testimony, my answers to interrogatories have not been prepared, I have not discussed this case or my testimony with anyone.

Int. No. 23. If you have not received any answers or telegrams and you have seen letters and telegrams to other persons as to your answering the interrogatories in this case, state who showed them to you and the contents of the same and if they are in your possession, file them as exhibits to your deposition?

Ans. No. 23. I have not seen or received any.

Int. No. 24. Are you acquainted with Col. T. B. Pryor, General Attorney for the St. Louis, Iron Mountain & Southern Railway Company and did you see him in New York City in May or June

of this year and did you talk with him about answering interrogatories in this case or what your testimony would be?

Ans. No. 24. I have not met Col. Pryor, do not know him, and have not seen, spoken or communicated with him in any way in New York City, or elsewhere.

(Signed)

MALCOLM TOWNSEND.

438

*Testimony of L. Weiler.*

L. WEILER, a witness called for the defendant, being first duly sworn, testified as follows:

Direct examination:

Q. Your name is L. Weiler?

A. Yes sir.

Q. You are claim agent for the A. R. T. Company?

A. Yes sir.

Q. What is the business of the A. R. T. Company?

A. We furnish cars and look after the handling of perishable freight by the Gould lines.

Q. I want to ask you in regard to account sales with reference to this particular case. What part, if any, does the account sales take in the filing of a claim?

A. Any claim where we consider it very important if we have the exact sales, we do that as a matter of check. We have had so many fraudulent claims that we have been forced to do it.

Q. When a commission merchant makes a sale, does he always have an account sales?

A. Always, in fact, our positive rules are that every claim must be supported by the original paid freight bill, original bill of lading and original account sales. I might add that is done for the protection of the original owner of the claim.

Cross-examination:

Q. A man who owns stuff—if Adam Miller bought these cars, he didn't have to file account sales?

A. Yes sir.

Q. If Adam Miller bought these peaches here at Greenwood, in New York they were his peaches, and he didn't have to account for peaches that were his?

A. If he had a loss due from the Railroad.

439 Q. If Adam Miller bought these peaches from Greenwood, hasn't he got a right to keep his books in his own way, and he don't have to send anybody that?

A. He makes the account sales in the event of a claim.

Q. Adam Miller bought these peaches in Greenwood and they were his and he didn't have to send any account sales back here?

A. In that event, no sir, he would not.

J. L. REA, being recalled by the defendant, testified as follows:

Direct examination:

Q. Take a person who has bought peaches and then sold them, his books would show an account sales?

A. Any reputable firm would keep an account of how they sold.

Q. If they bought them they don't make this account sales book?

A. I would think he would keep the sales the same way as if he was selling for somebody else.

Q. If he did keep his books would there be a copy of the account sales?

A. Yes sir.

Cross-examination:

Q. Any man has a right to keep his books any way he sees fit?

A. O yes.

440

*Testimony of R. A. Rowe.*

R. A. ROWE, being recalled by the defendant, testified as follows:

Direct examination:

Q. In the display of these cars that are put separate on the dock, the peaches are open in display there?

A. The lid is off so that parties who come in there, so people can see what they are.

Q. I believe you stated when you were there you saw none<sup>a</sup> of these peaches on the dock?

A. None of these, but that is the way they did the business.

Q. That is all.

*Testimony of J. L. Rea.*

J. L. REA, being recalled by the plaintiff, testified as follows:

Direct examination:

Q. I want to ask you if that dock master in charge of pier 29 is in the employ of the Pennsylvania Railroad Company?

Mr. Pryor: The defendant objects. He wasn't there in 1907.

The Court: The objection is sustained.

This was all the evidence introduced at the trial of this cause.

441

*Court's Finding.*

The Court: I feel a very profound conviction that it was a case of gross negligence on the part of the railroad company in taking these cars for want of icing, and that there was great damage done. Of course, I do not know anything about the case except what I have got in the case,—except the testimony, and that is fairly clear. The

only thing I feel any question about is whether the railroad had any notice. Of course, where the railroad company is in possession of the shipper's property, or of the consignee's property, it would be fair to say that they ought to have some kind of notice of what the condition is, particularly if it is in bad condition. There is testimony from which it may be fairly inferred that the Railroad Company did have notice of this condition and I feel like the plaintiff in this case ought to have judgment on each of these counts. Of course, the Supreme Court can make another construction of the question of notice, but as stated by Mr. Pryor, it may be a technical matter, but as far as the substantial right about this there is no doubt but that it is with the plaintiff, and if there is any doubt about it it will be up to the five gentlemen on the Supreme Bench. I will give judgment for the plaintiff in each count for \$2.25 and deduct the amount received,—that is for sixes.

On the first car No. 8787 the amount is \$507.15. I will give interest in this case from Aug. 10, 1907.

Car 9737 .....	\$595.35
Car 10640 .....	661.50
Car 10052 .....	646.65
Car 9478 .....	727.65
Car 8711 .....	500.63
Car 10542 .....	637.88
Car 9089 transferred from 10756.....	661.50
Car 8683 .....	661.50
Car 10875 .....	637.88
	<hr/>
	6237.69

442 To the finding of the court in each of the cases the defendant at the time duly saved its separate and several exceptions.

443 *Findings of Fact Requested by Defendant.*

The defendant requested the court to make the following findings of fact.

I.

The court finds the facts to be that no notice of any claim for damaged was given by the consignee as provided for in the bill of lading.

II.

That the peaches were accepted by the consignee without any exceptions being made as to their condition, and a receipt was given by the consignee showing they were received in good order.

## III.

That the evidence fails to show that the agent of the delivering carrier examined and knew of the condition of the peaches while in its possession after their arrival at destination, or that L. W. Rhodes or C. E. Carstarphen, agents of defendant had knowledge of the same.

The court refused to find the facts as requested in the above findings of fact, to which action of the court in declining to find the facts as requested, the defendant at the time separately and severally saved its exceptions.

The defendant requested the court to declare the law as follows:

*Declarations of Law.*

## I.

That under the law and evidence the plaintiff cannot recover.

## II.

That the burden of proof of showing that a notice of claim for damages was given or that the agents of the delivering line examined the peaches and knew of their condition while in its possession  
444 after arrival at destination, or that L. W. Rhodes and C. E. Carstarphen, agents of the defendant knew of the condition of the peaches upon arrival at destination, is upon the plaintiff.

## III.

That under the law the provision in the bill of lading is reasonable and that where no notice of a claim for damages was given as provided by the bill of lading and the evidence fails to show that the agents of the delivering carrier or the agents of the defendant examined and knew of the damaged condition of the peaches upon arrival at destination, the plaintiffs cannot recover.

## IV.

That under the law the plaintiff, if entitled to recover, would be entitled to recover on the basis of the value or cost of the peaches at point of shipment.

The court refused to declare the law as requested by the defendant, to which action of the court the defendant at the time separately and severally saved its exceptions.

*Declarations of Law.*

The above requests for findings of fact and declarations of law requested by defendant were not presented to the court until the

motion for new trial was filed. The defendant's attorney during the progress of the trial and after the evidence had been introduced on the first count in the case, stated to the court that he had prepared requests for findings of fact, and declarations of law which he would then present, or would wait until the evidence as to each of the counts was introduced and then present the same. To this suggestion of counsel for defendant the court stated that the request might be presented at any time during the trial. At the time of the presentation of motion for new trial when the requests for findings of fact and declarations of law were presented Mr. R. A. Rowe of counsel  
445 for plaintiff, objected to the court's consideration of said requests for findings of fact or declarations of law on the ground that the same were not presented in time or during the progress of the trial, and moved the court to decline to pass upon the same at the time they were presented, which motion the court sustained and endorsed upon said written requests for findings of fact and declarations of law, the following: "The court declines to pass on these declarations of law and findings of fact because not presented or asked during the trial of the cause nor until filing of motion for new trial. Jephtha H. Evan, Judge."

And these were all the declarations of law and findings of fact, asked, refused and given in the case.

And thereafter in due time the defendant moved the court to grant it a new trial, which motion for a new trial is in words and figures as follows, to wit:

(Caption Omitted.)

*Motion to Set Aside Judgments.*

Comes the defendant in the ten cases that were consolidated by order of the court herein, and moves the court to set aside its judgment in each of said cases, and to grant it a new trial in each of said cases, and for grounds therefor, states:

1. That the court erred in overruling defendant's demurrer to the complaints herein, over the objections and exceptions of defendant.

2. That the court erred in reinstating the deposition of Adam Miller after the same had been suppressed at a former term of the court, over the objections and exceptions of the defendant.

3. That the court erred in rendering judgment against the defendant in the case embracing A. R. T. car 8787 for the sum of  
446 \$507.15 with interest of \$197.78, over the objections and exceptions of defendant.

(a) That said judgment is not supported by the evidence.

(b) That said judgment is contrary to the law.

(c) That the court erred in refusing to find the facts as requested by defendant in its requests Nos. 1, 2 and 3 over the objections and exceptions of defendant.

(d) That the court erred in refusing to declare the law as requested by the defendant in its requests Nos. 1, 2, 3 and 4, to which action of the court in refusing to declare the law as requested, the defendant at the time excepted.



4. That the court erred in rendering judgment against the defendant in the case embracing A. R. T. car 9739 for the sum of \$595.35 with \$232.18 interest.

(a) That said judgment is not supported by the evidence.

(b) That said judgment is contrary to the law.

(c) That the court erred in refusing to find the facts in accordance with defendant's requested findings of fact, Nos. 1, 2 and 3, to which action of the court in refusing to find the facts as requested, the defendant at the time excepted.

(d) That the court erred in refusing to declare the law as requested by the defendant in its requests Nos. 1, 2, 3 and 4, to which action of the court in refusing to declare the law as requested, the defendant at the time excepted.

(e) That the amount of the judgment is excessive.

5. That the court erred in rendering judgment against the defendant in the case embracing A. R. T. car 10640 for the sum of \$661.50 with \$257.98 interest.

(a) That said judgment is not supported by the evidence.

447 (b) That said judgment is contrary to the law.

(c) That the court erred in refusing to find the facts in accordance with the defendant's requested findings of fact, Nos. 1, 2, and 3, to which action of the court in refusing to find the facts as requested, the defendant at the time excepted.

(d) That the court erred in refusing to declare the law as requested by the defendant in its requests Nos. 1, 2, 3 and 4, to which action of the court in refusing to declare the law as requested, the defendant at the time excepted.

(e) That the amount of the judgment is excessive.

6. That the court erred in rendering judgment against the defendant in the case embracing A. R. T. car No. 10756 for the sum of \$661.50 with \$257.98 interest.

(a) That said judgment is not supported by the evidence.

(b) That said judgment is contrary to the law.

(c) That the court erred in refusing to find the facts in accordance with defendant's requested findings of fact, Nos. 1, 2, and 3, to which action of the court in refusing to find the facts as requested, the defendant at the time excepted.

(d) That the court erred in refusing to declare the law as requested by the defendant in its requests Nos. 1, 2, 3 and 4, to which action of the court in refusing to declare the law as requested, the defendant at the time excepted.

(e) That the amount of the judgment is excessive.

7. That the court erred in rendering judgment against the defendant in the case embracing A. R. T. car 8683 for the sum of \$661.50 with \$257.98.

(a) That said judgment is not supported by the evidence.

(b) That said judgment is contrary to the law.

(c) That the court erred in refusing to find the facts in accordance with defendant's requested findings of fact, Nos. 1, 2, and 3, to which action of the court in refusing to find the facts as requested, the defendant at the time excepted.

(d) That the court erred in refusing to declare the law as requested by the defendant in its requests Nos. 1, 2, 3 and 4, to which action of the court in refusing to declare the law as requested, the defendant at the time excepted.

(e) That the amount of the judgment is excessive.

8. That the court erred in rendering judgment against the defendant in the case embracing A. R. T. car 10875 for the sum of \$637.88 with \$248.77 interest.

(a) That said judgment is not supported by the evidence.

(b) That said judgment is contrary to the law.

(c) That the court erred in refusing to find the facts in accordance with defendant's requested findings of facts, Nos. 1, 2 and 3, to which action of the court in refusing to find the facts as requested, the defendant at the time excepted.

(d) That the court erred in refusing to declare the law as requested by the defendant in its requests Nos. 1, 2, 3 and 4, to which action of the court in refusing to declare the law as requested, the defendant at the time excepted.

(e) That the amount of the judgment is excessive.

9. That the court erred in rendering judgment against the defendant in the case embracing A. R. T. car 9478 for the sum of \$727.65 with \$283.78 interest.

(a) That said judgment is not supported by the evidence.

(b) That said judgment is contrary to the law.

(c) That the court erred in refusing to find the facts in accordance with defendant's requested findings of fact, Nos. 1, 2 and 3, to which action of the court in refusing to find the facts as requested, the defendant at the time excepted.

449 (d) That the court erred in refusing to declare the law as requested by the defendant in its requests, Nos. 1, 2, 3 and 4, to which action of the court in refusing to declare the law as requested, defendant at the time excepted.

(e) That the amount of the judgment is excessive.

10. That the court erred in rendering judgment against the defendant in the case embracing A. R. T. car 8711 for the sum of \$500.63 with \$195.24 interest.

(a) That said judgment is not supported by the evidence.

(b) That said judgment is contrary to the law.

(c) That the court erred in refusing to find the facts in accordance with defendant's requested findings of fact, Nos. 1, 2 and 3, to which action of the court in refusing to find the facts as requested, the defendant at the time excepted.

(d) That the court erred in refusing to declare the law as requested by the defendant in its requests Nos. 1, 2, 3 and 4, to which action of the court in refusing to declare the law as requested, the defendant at the time excepted.

(e) That the amount of the judgment is excessive.

11. That the court erred in rendering judgment against the defendant in the case embracing A. R. T. car 10542 for the sum of \$637.88 with interest of \$248.77.

- (a) That said judgment is not supported by the evidence.
- (b) That said judgment is contrary to the law.
- (c) That the court erred in refusing to find the facts in accordance with defendant's requested findings of fact, Nos. 1, 2 and 3, to which action of the court in refusing to find the facts as requested, the defendant at the time excepted.
- (d) That the court erred in refusing to declare the law as requested by the defendant in its requests Nos. 1, 2, 3 and 4, to which 450 requested, the defendant at the time excepted.
- (e) That the amount of the judgment is excessive.

12. That the court erred in rendering judgment against the defendant in the case embracing A. R. T. car 10052 for the sum of \$646.65 with \$252.19 interest.

- (a) That said judgment is not supported by the evidence.
- (b) That said judgment is contrary to the law.
- (c) That the court erred in refusing to find the facts in accordance with defendant's requested findings of fact, Nos. 1, 2 and 3, to which action of the court in refusing to find the facts as requested, the defendant at the time excepted.
- (d) That the court erred in refusing to declare the law as requested by the defendant in its requests Nos. 1, 2s and 4, to which action of the court in refusing to declare the law as requested the defendant at the time excepted.

13. That the court erred in assessing interest against the defendant at the rate of six per cent. from the date of the shipment, or the delivery at destination.

14. That under the Act of Congress and the amendment thereto of June 29, 1906, amendatory of the Act regulating Interstate Commerce, the defendant is not liable under the evidence adduced on the various shipments alleged.

15. That the court erred in refusing to pass upon the findings of fact and declarations of law presented and requested by defendant.

Wherefore, defendant prays that said judgment be set aside, and that it be granted a new trial.

ST. LOUIS, IRON MOUNTAIN &  
SOUTHERN RAILWAY CO.,

(Signed)

By THOS. B. PRYOR, *Att'y.*

And the court having said motion for new trial under ad-  
451 visement and having heard argument of counsel thereupon, did overrule the same, to-wit: on the 16th day of February, 1914, to which defendant duly saved its exceptions and thereupon prayed an appeal to the Supreme Court of Arkansas, which prayer was by the court granted and the defendant was given ninety days in which to prepare and file its bill of exceptions.

Now comes the St. Louis, Iron Mountain & Southern Railway Company, and tenders this as its bill of exceptions, affirming that the same contains a true and perfect transcript of all the evidence and proceedings had at the trial of this cause, and asks that the same be signed, sealed and made a part of the record herein, which is accordingly done on this the 15 day of May, 1914.

JEPHTHA H. EVANS, *Judge.*

(Bill of Exceptions endorsed: "Filed this 15th day of May, 1914."  
A. Hays, Clerk, by C. M. Bledsoe, D. C.)

452

*Intervention of R. A. Rowe.*

C. A. STARBIRD, Special Adm'r of Adam Miller, Deceased, Plaintiff,  
vs.  
ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY Co., Defendant

On this day comes on to be heard the intervention of Robert A. Rowe, Attorney, and Intervener in above entitled cause, the intervener being represented by Robert A. Rowe; the court after hearing the evidence finds that under and by virtue of an agreement of Adam Miller made by and between Robert A. Rowe as attorney, agent and manager, and the said Adam Miller that it was agreed between the aforesaid parties that Adam Miller was to pay sixty five cents per crate for all of the crates of peaches embraced in the hereinafter named cars, and one half of whatever sum is recovered on said cars to wit: A. R. T. cars 8787, 10542, 10875 and 10052 and to sue the defendant company; and to pay \$1.25 per crate for all the peaches on said cars and afterwards paid the sixty five cents according to the terms of the contract and was to pay the further sum as above stated of one half of the judgment recovered in the above case on said cars, which is the sum of \$3,377.27, and that the intervener is entitled as aforesaid to one half of said sum which is \$1,688.63 together with the interest at six per cent that the judgment bears on said cars.

It is therefore considered, ordered and adjudged by the court that the Intervenor Robert A. Rowe have and recover the sum of \$1,688.63, one half of said judgment together with interest thereon at the rate of six per cent until paid.

"Law Record I, Page 528."

453

*Judgment.*

C. A. STARBIRD, Special Adm'r of Adam Miller, Deceased, Plaintiff,  
vs.  
ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY Co., Defendant.

On this eleventh day of February, 1914, the above cause coming on to be heard, the plaintiff being represented by Rowe & Rowe and Robert A. Rowe, his attorneys, and the defendant being represented by T. B. Pryor, its attorney, and both parties in pursuance to an agreement heretofore made by the attorneys for both parties in open court waiving the jury submit this case to the court sitting as a jury, by consent of the attorneys representing the plaintiff and defendant.

The court after hearing the testimony and the argument of counsel and being well and sufficiently advised in the premises, doth

find for the plaintiff in each of the following ten cases consolidated, as follows, to wit:

In the case embracing car A. R. T. #8787..	\$507.15	Int. 197.78
In the case embracing car A. R. T. #9737..	595.35	232.18
In the case embracing car A. R. T. #10640..	661.50	257.98
(10756)		
In the case embracing car A. R. T. #9089..	661.50	257.98
In the case embracing car A. R. T. #8683..	661.50	258.98
In the case embracing car A. R. T. #10875..	637.88	248.77
In the case embracing car A. R. T. #9478..	727.65	283.78
In the case embracing car A. R. T. #8711..	500.63	195.24
In the case embracing car A. R. T. #10542..	637.88	248.77
In the case embracing car A. R. T. #10052..	646.65	252.19

With six per cent interest on each of the above sums as damage on each of the above cars from August tenth, 1907, the interest on said sums appearing in the last above column to the right 454 which is the amount of interest calculated up to the tenth day of February, 1914, making the amount on each of the above cars up to said date as follows, to wit: \$704.93, \$827.53, \$919.48, \$919.48, \$886.86, \$1,011.43, \$895.87, \$886.65, \$898.84, respectively, and the total sum of \$8,670.34.

It is therefore considered ordered and adjudged by the court that the plaintiff have and recover of and from the defendant St. Louis, Iron Mountain & Southern Railway Company the sum of \$8,670.34 as damages, with six per cent interest from date until paid in the cases consolidated herein, and all their cost laid out and expended for which execution may issue.

Law Record "I" page 524.

455

*Intervention of R. C. Cumbie.*

C. A. STARBIRD, Special Adm'r of Adam Miller, Deceased, Plaintiff,  
vs.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY CO., Defendant.

On this day comes R. C. Cumbie to be heard as Intervener in the above entitled cause, the Intervener being represented by Robert A. Rowe, his attorney, and the court after hearing the evidence finds that under and by virtue of an agreement by and between Adam Miller and D. T. Goldsmith and Robert A. Rowe, as his attorney and agent, that Adam Miller was to pay sixty five cents per crate for all the crates embraced in A. R. T. cars 10640, 8685, 9737 (10756), 9089, 8711 and 9478, and to bring suit against the defendant company and pay one half of whatever judgment is recovered in the above cause, which judgment amounts to \$5,293.07, one half of which is \$2,646.53; that the said Adam Miller paid the sixty five cents per crate on all of said cars except car 9089 (10756) which contained 490 crates which would amount to \$318.50 with six per cent interest thereon, which is in addition to one half of

the judgment recovered on said cars. That said cars were originally purchased by Adam Miller at \$1.25 per crate.

It is therefore considered, ordered and adjudged by the court that R. C. Cumbie, Manager and Intervener have and recover the sum of one half of the judgment on said cars which is \$2,646.53 and \$318.50 with the interest thereon from August 10, 1907, to date, amounting to \$442.71 making the total sum of \$3,089.24 with six per cent interest until paid.

"Law Record I, Page 527."

456 In the Crawford Circuit Court, February 16, 1914.

ADAM MILLER et al., Plaintiffs,

vs.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY Co., Defendant.

*Filing Motion for New Trial.*

On this day defendant files motion for new trial; motion overruled; defendant excepts. Ninety days allowed to file bill of exceptions. Appeal prayed and granted.

Law Record "I" page 529.

457 C. A. STARBIRD, Special Adm'r of Adam Miller, Deceased,  
Plaintiff,

vs.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY Co., Defendant.

*Allowance for Adm'r.*

And now on motion of plaintiff C. A. Starbird, Special Administrator, is allowed a compensation to date the sum of five per cent of the amount recovered to be paid out of amounts collected on judgment when collected.

Law Record "I" page 529.

458 STATE OF ARKANSAS:

In the Supreme Court.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,  
Appellant,

vs.

ADAM MILLER, Appellee.

Appealed from Crawford Circuit Court.

*Supersedeas Bond.*

Whereas, the appellant, St. Louis, Iron Mountain & Southern Railway Company has taken an appeal from the judgment of the

Crawford circuit court rendered at a special adjourned term in February, 1914, against it in favor of the appellee, Adam Miller, for the sum of \$6237.69 with costs, and the appellant desires to supersede said judgment, now the said St. Louis, Iron Mountain & Southern Railway Company as principal, and T. B. Pryor and Geo. R. Wood as sureties hereby covenant with the said appellee that all costs and damages that may be adjudged against the appellant on appeal, or in the event of the failure of the appellant to prosecute said appeal to a final judgment in the Supreme court, or if said appeal shall for any cause be dismissed, that said sureties shall pay to the appellee all costs and damages, and shall perform the judgment of the court appealed from in case it should be affirmed and any judgment or order which the Supreme Court may render, or order to be rendered by the inferior court, not exceeding in amount or value the original judgment or order, and all interests and costs during the pendency of the appeal.

Witness our hands this the 2nd day of March, 1914.

ST. LOUIS, IRON MOUNTAIN &  
SOUTHERN RAILWAY CO.,

By THOS B. PRYOR, *Attorney*.

THOS. B. PRYOR AND  
GEO. R. WOOD, *Sureties*.

Approved:

A. HAYS, *Clerk*,

By CROCKETT BLEDSOE, *D. C.*

459

*Clerk's Certificate.*

ADAM MILLER et al., Plaintiffs,

vs.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,  
Defendants.

*Certificate.*

STATE OF ARKANSAS,

*County of Crawford:*

I, C. M. Bledsoe, Clerk of the Circuit Court of Crawford County in the State of Arkansas, do hereby certify that the foregoing pages of typewritten matter contain a true, perfect, full, complete and compared transcript of all pleadings, depositions, and court proceedings in the above entitled cause.

In Testimony Whereof, I, hereunto subscribe my name and affix the seal of this court, this 16th day of January, 1915.

[SEAL.]

C. M. BLEDSOE, *Clerk*.



460

*Filing in Supreme Court.*

No. 3482.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,  
Appellant,

vs.

C. A. STARBIRD, Special Administrator of Adam Miller, Deceased,  
Appellee.

Crawford, Clerk.

Jeptha H. Evans, J.

*Transcript.*

Filed January 29, 1915.

P. D. ENGLISH, Clerk,  
By W. P. SADLER, D. C.

461

*Record Entries.*

STATE OF ARKANSAS:

*In the Supreme Court.*

Be it remembered, that at a term of the Supreme Court of the State of Arkansas, begun and held on the 24th day, being the fourth Monday of May, A. D. 1915, at the Courthouse, in the City of Little Rock, the following proceedings were had, to-wit: On the 31st day of May, 1915, a day of said term:

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,  
Appellant,

vs.

C. A. STARBIRD, Administrator, Appellee.

*Appeal from Crawford Circuit Court.*

Comes the appellee by attorney and files a petition for rehearing, duly served; and on his motion for time, said appellee is allowed by the court one week from date in which to file a supporting brief.

And now comes the appellant by attorney and files a petition for rehearing, duly served; and on its motion for time, said appellant is allowed by the Court two weeks from date in which to file a supporting brief.

May Term, 1915, June 7, 1915.

(Caption Omitted.)

The petition for rehearing being regularly called is passed one week for appellant's response to appellee's petition for rehearing.

462 May Term, 1915, June 14, 1915.

(Caption Omitted.)

The petition for rehearing having been filed within the time allowed by law, the said petitions are now called, the same are submitted with the responses and briefs, and are by the court taken under advisement.

May Term, 1915, June 28, 1915.

(Caption Omitted.)

Being fully advised, the petitions for rehearing filed therein is by the court overruled.

463 *Judgment.*

November Term, 1914, May 17th, 1915.

(Caption Omitted.)

This cause came on to be heard upon the transcript of the record of the circuit court of Crawford County, and was argued by counsel, on consideration whereof it is the opinion of the court that there is no error in so much of the proceedings and judgment of said circuit court as finds in favor of the plaintiff below on the following cars, viz: A. R. T. 10640, A. R. T. 8683, A. R. T. 10875, A. R. T. 10542 and A. R. T. 10052.

It is therefore considered by the court that so much of the judgment of said circuit court as is in favor of the plaintiff for damages to the shipment contained in the cars aforesaid, be, and the same is hereby, in all things, affirmed with costs, and that said appellee recover of said appellant and Thos. B. Pryor and George R. Wood, sureties in the supersedeas bond filed in this cause, the sum of Four Thousand, Five Hundred and Eleven Dollars and ten cents, the amount of judgment of said circuit court on account of damage to the shipment in the cars aforesaid, and that said amount bear interest at six per cent from the 11th day of February, A. D. 1914; and further that said appellee recover of said appellant and said sureties all his costs in said circuit court in this cause expended, and have execution thereof.

But the court is further of the opinion that there is error in so much of the judgment of said circuit court as is in favor of the plaintiff below on account of damage to the shipment contained in the other five cars named in the complaint and the judgment aforesaid, in this: The plaintiff's intestate failed to give the notice of intention to claim damages within the time stipulated in the bills of lading, and the court erred in not dismissing the complaint as to said cars.

464 It is therefore considered by the court that so much of the judgment of said circuit court as is in favor of the plaintiff

for damages to the shipments contained in said five other cars, viz: A. R. T. 8787, A. R. T. 9737, A. R. T. 9089, A. R. T. 9478 and A. R. T. 8711, be, and the same is hereby, for the error aforesaid, reversed, annulled and set aside with costs, and that this cause be, and it is here now, as to any claim for damages based on the said cars, dismissed.

It is further considered that said appellant recover of said appellee all its costs in this Court in this cause expended, and have execution thereof.

465 STATE OF ARKANSAS:

In the Supreme Court.

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 23rd day, being the fourth Monday of November, A. D. 1914, at the Courthouse, in the City of Little Rock the following proceedings were had, to-wit: On the 12th day of April, 1915, a day of said term:

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,  
Appellant,

vs.

C. A. STARBIRD, Administrator, Appellee.

Appeal from Crawford Circuit Court.

On motion of appellee the said cause is set down for oral argument on the 19th of April, 1915.

November Term, 1914, April 19th, 1915.

(Caption Omitted.)

This cause being regularly called, come the parties by their attorneys, and said cause is by the court submitted, upon the transcript of the record and the briefs filed and upon oral argument, and is by the court taken under advisement.

466 In the Supreme Court of Arkansas.

No. 3482.

ST. L., I. M. & S. Ry. Co., Appellant,

vs.

C. A. STARBIRD, Special Adm'r Adam Miller, Deceased, Appellee.

Appeal from Crawford Circuit Court.

*Petition for Rehearing.*

Comes C. A. Starbird, Special Adm'r of Adam Miller, and moves the court to set aside the judgment reversing and dismissing as to

cars 8787, 9737, 9089, (10756), 9478, and 8711, in the above entitled action and prays the court to affirm the judgment of the lower court, as to said cars for the following reasons:

1. Because the court erred in holding that notice to the delivering carrier of the damaged condition of the peaches in said cars was insufficient.

2. Because the court erred in holding that the testimony on the part of appellee as to notice to the delivering carrier was insufficient to support the finding of the court sitting as a jury, which is as conclusive as the verdict of a jury.

3. Because the finding of the court sitting as a jury on conflicting testimony is as conclusive as a verdict of a jury.

4. Because every question of law has been settled in this case by the appeal on demurrer in the Cumbie case and the only question before the trial court was the question of fact as to notice of the delivering carrier of the damaged condition of the peaches which was tried by the court sitting as a jury and is conclusive.

5. Because this court erred in reversing and dismissing the judgment of the lower court as to the above cars. This being a  
467 question of fact, which was passed on by the Court sitting as a jury and is conclusive under all the prior decisions of this court where there is any evidence to sustain it.

6. Because there is an abundance of testimony to sustain the finding of the court.

7. Because there was no prejudicial error and the judgment was right upon the whole case and should be affirmed.

8. Because the testimony as to notice in each case upon which judgment was rendered was uncontradicted and positive that the delivering carrier had actual knowledge of the rotten and damaged condition of the peaches in which this court has held that the stipulation in the bill of lading does not apply to it.

9. Because this court holds and has held as well as all other courts that it makes no difference whether the provision of the contract requires written notice of loss or damage to be given, or whether the language of the contract provided for written notice of an intention to claim for loss or damage, under our decisions, the purport of these provisions is the same, have the same legal effect and are not limitations upon, or exemptions from liability of the carrier, but are only conditions precedent to recovery.

10. Because the court erred in overlooking and not taking into consideration the facts and circumstances as shown by the testimony as to the notice of the delivering carrier as to the rotten and damaged condition of the peaches embraced in said cars.

11. Because the court erred in failing to take into con-  
468 sideration overlooking the fact that these peaches were worth \$2.25 per crate in the City of New York, and that the delivering carrier well knew that the object and purpose that Adam Miller had for sending those cars to the Merchants Refrigerating Co., was to resort them because they were rotten and would be dumped, that is the railroad company would be required to dump

them by the board of health if they were brought to the dock before being sorted.

12. Because the court erred in reversing and dismissing the judgment of the lower — for the facts and circumstances *is* ample to show that the delivering carrier *who* unloaded these five cars of peaches and delivered them to the Merchants Refrigerating Co., and the juice ran out of the crates on the parties *who* unloaded them and the peaches could be plainly seen in the crates which were made of slats.

13. Because the facts and circumstances show that the delivering carrier had an inspector who inspected these five cars of peaches.

14. Because the testimony shows it was the custom of the delivering carrier to inspect and that it did inspect those peaches and knew for itself the rotten and damaged condition of the same.

STATE OF ARKANSAS,

*County of Sebastian:*

I, Robert A. Rowe, state that I have carefully examined the foregoing petition for re-hearing and know that there is merit in it and that the judgment should be reversed, and a re-hearing granted and the judgment of the lower court affirmed as to those five cars.

May 26, 1915.

ROBERT A. ROWE,  
*Attorney for Appellee.*

469

In the Supreme Court of Arkansas.

No. 3482.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,  
Appellant,

vs.

C. A. STARBIRD, Special Administrator of the Estate of Adam Miller,  
Deceased, Appellee.

*Petition for Rehearing.*

Comes the appellant, St. Louis, Iron Mountain & Southern Railway Company, and petitions the court to set aside that part of the judgment herein rendered against it and to grant it a rehearing, and for grounds therefor, states:

I.

That said judgment affirming the judgment of the lower court as to five of the cars involved in this case, is contrary to the law.

II.

That said judgment affirming the judgment of the lower court as to five of the cars involved in this case, is contrary to and not supported by the evidence.

## III.

That the court erred in holding and deciding that the delivering carrier had actual knowledge of the damaged condition in which the peaches arrived that were shipped in A. R. T. cars Nos. 10640, 8683, 10875, 10542 and 10052.

## IV.

470 That the court erred in holding and deciding that knowledge of the dock foreman of the damaged condition of the peaches was sufficient of itself to convey notice to the delivering carrier that the consignee would present a claim for damages.

## V.

That the court erred in refusing to hold and decide that the written notice of an intention to claim damages provided for in the bill of lading was necessary to be given before the plaintiff would be entitled to recover.

## VI.

The court erred in holding and deciding that the suits embraced in this appeal were originally begun on the 7th of April, 1908, and were removed to the Federal Court for the Western District of this State where non-suits were taken in July, 1910, and thereafter the suits were again brought in the Sebastian Circuit Court.

## VII.

The court erred in refusing to hold and decide that the plaintiff was barred from recovering in these suits under the provisions of section 16 of the Act of Congress which provides that all complaints to recover damages shall be filed within two years from the time the cause of action accrues. As the record shows, these suits were not filed in the Crawford County Circuit Court from which the appeal herein was taken until July, 1910.

THOS. B. PRYOR,  
*Attorney for Appellant.*

*Certificate.*

I, Thos. B. Pryor, attorney for appellant, hereby certify that I have carefully read the opinion of the court in the above cause and that the petition for rehearing herein is not filed for the purpose of delay, but is filed in good faith believing the appellant is entitled to a reconsideration of the judgment rendered against it in the above cause.

THOS. B. PRYOR,  
*Attorney for Appellant.*

471 In the Supreme Court of Arkansas, May 17, 1915.

No. 397.

St. L., I. M. & S. Ry. Co.

v.

STARBIRD.

*Opinion.*

SMITH, J.:

The suits embraced in this appeal were originally begun on the 7th of April, 1908, and those causes were removed to the Federal Court, Western District, of this State, where non-suits were taken in July, 1910. And thereafter the suits were again brought in the Greenwood District of the Sebastian Circuit Court. Ten carloads of peaches are involved in this litigation, and there were originally ten suits, but the causes were consolidated and tried together, and a single appeal has brought the judgment in all of the cases before us for review.

The peaches were shipped from Greenwood, in Sebastian County, to Adam Miller in New York City, and suit was brought by Miller to recover damages to compensate the loss sustained to the peaches in transit. Miller died before final judgment, and the cause was revived in the name of a special administrator.

There was proof to support the finding by the court below that the damage to the peaches resulted from the failure of the railroad to ship the peaches promptly and to ice them properly, and the evidence was also sufficient to sustain the amount of damages found by the court in the case of each of the cars.

The bills of lading for the respective cars all contained the provision that the carrier should not be liable for any damages sustained to the peaches unless written notice was given within 36 hours after the arrival of the peaches at their destination of the damages sustained. It was alleged in the complaint that a written notice had been given; but the proof is insufficient to sustain that allegation. It is very earnestly urged, however, that personal notice was given and that the delivering carrier had such actual knowledge of the damage done the peaches as that a written notice was unnecessary and would only have advised the delivering carrier of a fact about which it already had full information. The proof on the part of appellee was to the effect that the cars were delivered at the railroad terminal in Jersey City, after which they were switched from the road to a lighter, which was ferried across the Hudson River to a pier numbered 29, which was devoted to the reception of perishable fruits. The cars were taken from the lighter to the dock, which was entirely closed and no one was allowed inside the dock until the cars had been unloaded and the fruit placed in piles, the crates of peaches in each car being placed in a separate pile. The cars were unloaded by employees of the railroad company, and



at midnight bulletins were posted up showing the car numbers and the dealers to whom the fruit was consigned, and at one o'clock in the morning the dock doors were opened and the dealers permitted to go in and get their peaches. But no one was permitted in the dock until the peaches were ready for delivery, and no consignee would know whether the cars consigned to him had been received until midnight when the bulletins were posted. The custom was that, if

the peaches were sound, they were sold at the dock and were  
473 usually gotten rid of before noon of the day of their receipt;  
but, if many of them were bad, and had to be sorted out, the authorities at the dock required the consignees to haul the peaches to their places of business and there sort them out, at which time the sound fruit would be re-packed in crates and the faulty fruit thrown away.

It is insisted on behalf of appellees that the delivering carrier was necessarily charged with notice of the condition of the fruit at the time of its arrival at its destination; that this is so because the delivering carrier had inspectors at the dock whose business it was to inspect and ascertain the condition of the various shipments, and that the consignments here involved were in such bad shape that the carrier must necessarily have known that considerable damage had been sustained, as the fruit was shipped in crates which were open so that from a superficial examination it could be seen that the fruit had discolored and had become specked and that large quantities of juice from the fruit had run out of the crates over other crates, and that these crates could not have been handled without the railroad company acquiring this knowledge.

The deposition of Adam Miller was taken upon interrogatories in each of these cases, and in five of those depositions he was asked this question: "Interrogatory No. 17. State whether you, or any of your employees, told any of the employees of delivering carrier of the damaged condition of the peaches in said car, and whether or not employees of said railroad company went into the car and inspected the  
474 peaches, and, if they did not go into the car, did they unload  
or see the peaches unloaded, and knew of the damaged condition of the peaches, giving name of the employee, if you know, and the position he holds with the company?"

"His answer was 'I don't know.'"

The following question was also asked: "Interrogatory No. 18. State if you know whether the railroad company, at that end of the line, had an employe to inspect said car of peaches, and knew of the condition in which the car arrived?"

"Answer to Interrogatory No. 18. I don't know."

These questions were asked and answers given in regard to the following cars involved in this litigation, to-wit: A. R. T. 8787; A. R. T. 9737; A. R. T. 10756; A. R. T. 9478; A. R. T. 8711.

But different answers were given in regard to the remaining 5 cars, which had the same initials and were numbered as follows: 10640; 8683; 10875; 10542; 10052. As to these last numbered cars the witness answered the Interrogatory No. 17 as follows: "I called the attention of the dock foreman to the bad peaches, and told

him they were not iced and had gone bad. I do not know the dock foreman's name. He is in the employ of the Pennsylvania Railroad, which owns the dock where the peaches were unloaded from the car which was lightered from Jersey City to New York. I don't know his name. He looked at them and went away." And, in response to Interrogatory No. 18, he testified: "The railroad company has a man at the dock who inspects the peaches as they come on the dock off of the cars and see the condition which they arrive in."

We have to-day handed down an opinion in a companion case. See *St. L. I. M. & S. Ry. Co. v. Cumbie, et al.* Ms. Op. In that case we reviewed our previous decisions on the question of  
475 the validity of the stipulation contained in the bill of lading requiring notice to be given of the damaged condition of the goods within 36 hours after arrival at their destination. The validity of the stipulation was again upheld in that case, as it had been in several prior decisions, and the judgment recovered in that case was reversed because the proof did not show a compliance with this condition. That case also stated the rule as to the circumstances and conditions under which the knowledge of the carrier in regard to the condition of the damaged goods would be held to dispense with the necessity of giving the notice. That opinion quoted with approval from the case of *Cumbie v. St. L. I. M. & S. Ry. Co.* 105 Ark., 406, the following language:

"Where the facts stated show that the delivering carrier has actual knowledge of all the conditions that a written notice could give it, then written notice is not required, and a provision requiring it under circumstances would be unreasonable."

The purpose of this notice is manifest, and has been stated in our decisions upholding it. Its object is that the carrier may inspect the goods and ascertain the nature and extent of the damage while the truth in regard to any claim for damages may be known. But where the carrier possesses this information independently of the notice, the giving of the notice can serve no necessary purpose.

It is insisted that the carrier should be charged with notice of any information possessed by any of its servants or employees. But  
476 we cannot agree with this contention. None of our cases hold, nor has it been so held in the decisions of any other jurisdiction of which we are aware. To so hold would render the provisions in regard to notice practically nugatory. In the present case the laborers who unloaded the cars were called longshoremen, and some of these men unquestionably knew that some of the peaches contained in the cars were in a damaged condition; but this is not the knowledge contemplated by the bill of lading. To comply with the terms of the bill of lading it is essential, either that the notice be given to the company in writing, or, if this is not done, that personal notice be given to that employee or agent of the company whose duty it would be, if written notice had been received, to make the inspection to ascertain the nature and extent of the damage, if such employee or agent does not already possess this knowledge. These longshoremen were under no duty to in-

spect the peaches. They had no duty to perform except that of taking the crates of peaches out of the cars and piling them on the dock, and they would not know whether written notice had been given to the company or not, and there is nothing in the record to indicate that any duty of inspection would have developed upon them had the written notice in fact been given. There is much evidence in this record tending, on the one hand, to corroborate Mr. Miller and, on the other hand, to contradict him. But we are not called upon to weigh this evidence, nor to pass upon the credibility of the witnesses. It is our duty simply to determine whether or not the evidence is legally sufficient to sustain the verdict. We will not undertake to review the evidence in detail, but state our conclusion to be that, as to the five cars first mentioned, there was no proof of knowledge of the damage sufficient to supply the failure to give the notice in writing provided for by the bill of lading  
477 and as to these cars the judgment must be reversed, and as the case has been fully developed the suits as to them will be dismissed. But we think a different rule must be applied to the last five mentioned cars. As to them the proof showed that the peaches were placed in piles as they were unloaded from the cars and that neither the consignee nor his representative was allowed in the dock until after the cars had been completely unloaded, and that Miller went to the foreman of the dock, who was the man in authority there, and reported to him the damaged condition of the peaches, and that the foreman went with Miller to these peaches and saw the peaches, but left without making any comment, and that this foreman was the representative of the delivering carrier. The proof further shows that an inspection of the peaches by the railroad company could have been made then and there. The answer to the 18th interrogatory shows that the railroad company maintained an inspector at the dock. Yet, notwithstanding this fact, we do not hold the railroad company liable for the first five mentioned cars, because the proof does not show that this inspector had any duty to perform concerning them. Upon the other hand, we cannot assume that there was any uncertainty about Miller's purpose in hunting up the dock foreman and reporting to him the condition of the five remaining cars and in going with this fireman to the piles of peaches about which the complaint was being made. The proof does not show that Miller stated to the dock foreman that it was his intention to sue for the damage to the peaches; but it is not indispensable that the written notice should have contained this statement. The purpose and effect of Miller's statement  
478 to the foreman was to advise the representative of the delivering carrier in authority of the fact that damage had been done, and the giving of this notice under the circumstances must be held sufficient to charge the delivering carrier with knowledge of the fact that compensation would be claimed.

The depositions of Miller, upon motion of appellant, had been suppressed at a former term of court for the reason, principally, that the certificate of the notary was defective. This certificate was amended, and upon motion of appellee the court set aside its former

order suppressing the depositions and permitted them to be read upon the hearing of the cause. There was no intimation that the integrity of the depositions had not been preserved, neither was there any question about the depositions having been properly transmitted by the clerk. No prejudicial error was committed in this respect.

As to the five cars last mentioned the judgment will be affirmed; but as to the others the judgment is reversed and the cause dismissed.

479 SUPREME COURT,  
*State of Arkansas, ss:*

*Clerk's Certificate.*

I, P. D. English, clerk of said court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of St. Louis, Iron Mountain & Southern Railway Company, Appellant, vs. C. A. Starbird, Special Administrator of the Estate of Adam Miller, Deceased, Appellee, and also of the opinion of the court rendered therein, as the same now appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Little Rock, Arkansas, this October 7, 1915.

[Seal of the Supreme Court of Arkansas.]

P. D. ENGLISH,  
*Clerk Supreme Court of Arkansas,*  
By J. H. CAMPBELL, D. C.

480 In the Supreme Court of Arkansas.

No. 3482.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,  
Appellant,

vs.

C. A. STARBIRD, Administrator of the Estate of Adam Miller,  
Deceased.

*Assignment and Prayer.*

Considering itself aggrieved by the final decision of the Supreme Court in rendering judgment against it in the above entitled case, the defendant hereby prays a writ of error, from the judgment and decision, to the United States Supreme Court, and an order fixing the amount of the Supersedeas bond.

And the said St. Louis, Iron Mountain & Southern Railway Company assigns the following errors in the records and proceedings of the said case:

## I.

That the Supreme Court of Arkansas erred in holding and deciding that it is unnecessary for the plaintiff in error to show that the consignee had complied with the provisions of the bill of lading, which required written notice of an intention to claim damages to be given to the agent of the delivering line at destination or to the agent of the initial carrier at the point of origin to entitle plaintiff to recover. Said shipments being interstate and governed by an Act of Congress, known as an "Act to Regulate Commerce."

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## II.

The Court erred in holding and deciding that knowledge of the dock foreman of the damaged condition of the peaches upon arrival at destination was sufficient of itself to convey notice to the delivering carrier that the consignee would present a claim for damages and that such knowledge on the part of the dock foreman, that it would be unnecessary for the consignee to comply with the provisions of the bill of lading which required the consignee to give notice in writing, within thirty-six hours after notice of arrival of shipment at destination, of an intention to claim damages; said provision of the bill of lading being reasonable under the provisions of the Act of Congress, known as "An Act to Regulate Commerce."

## III.

That the court erred in refusing to hold and decide that the plaintiff was not barred from recovering in these suits under the provision of Section 16 of the Act of Congress which provides that all complaints to recover damage shall be filed within two years from the time the cause of action accrues. As the record shows these suits were not filed in the Crawford County Circuit Court, from which the appeal herein was taken until July, 1910.

## IV.

That the court erred in holding and deciding that the delivering carrier had actual knowledge of the damaged condition in which the peaches arrived that were shipped in A. R. T. cars Nos. 10640, 8683, 10875, 10542 and 10052.

## V.

That the Court erred in affirming the judgment of the lower court, as to the five cars numbered A. R. T. 10640, 8683, 10875, 10542 and 10052, and in rendering judgment against the appellant for the amount of the alleged loss on said five cars of peaches.

482 For which errors the appellant prays that said judgment of the Supreme Court of Arkansas, dated June —, 1915, be reversed and judgment rendered in favor of appellant company and for costs.

THOS. B. PRYOR,  
*Attorney for St. L., I. M. & S. Ry. Co.*

Filed October 7, 1915. P. D. English, Cl'k, by J. H. Campbell,  
D. C.

483 *Petition for Writ of Error and Allowance.*

In the Supreme Court of Arkansas.

No. 3482.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,  
Appellant,

vs.

C. A. STARBIRD, Administrator of the Estate of Adam Miller,  
Deceased, Appellee.

*Petition for Writ of Error.*

Considering itself aggrieved by the final decision of the Supreme Court in rendering judgment against it in the above entitled case, the defendant hereby prays a writ of error, from the said decision and judgment, to the United States Supreme Court, and an order fixing the amount of a supersedeas bond.

The assignment of errors hereto attached and marked Exhibit "A."

THOS. B. PRYOR,  
*Attorney for Defendant.*

In the Supreme Court of Arkansas.

Let the writ of error issue upon the execution of a bond by the St. Louis, Iron Mountain & Southern Railway Company to C. A. Starbird, Administrator of the estate of Adam Miller, Deceased, in the sum of Five Thousand Dollars; such bond when approved to act as a supersedeas.

October 4, 1915.

E. A. McCULLOCH,  
*Chief Justice Supreme Court of Arkansas.*

Filed October 7, 1915. P. D. English, Cl'k, by J. H. Campbell,  
D. C.

484 *Copy.*

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,  
Plaintiff in Error,

vs.

C. A. STARBIRD, Administrator of the Estate of Adam Miller,  
Deceased, Defendant in Error.

*Bond.*

Know all men by these presents, That we, St. Louis, Iron Mountain & Southern Railway Company as principal and T. W. M. Boone

and I. H. Nakdimen, as sureties, are held and firmly bound unto C. A. Starbird, Administrator of the estate of Adam Miller, deceased, in the sum of Five Thousand Dollars, to be paid to the said C. A. Starbird, administrator of the estate of Adam Miller, deceased, to which payment, well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Sealed with our seal- and dated this 8th day of July, 1915.

Whereas, the above-named plaintiff in error seeks to prosecute its writ of error to the U. S. Supreme Court to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Arkansas.

Now, therefore, the condition of this obligation is such, that if the above-named plaintiff in error shall prosecute its said writ of error to effect, and answer all costs and damages that may be adjudged if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

ST. LOUIS, IRON MOUNTAIN &  
SOUTHERN RY. CO.,  
By THOS. B. PRYOR, *Attorney.*  
I. H. NAKDIMEN.  
T. W. M. BOONE.

485 STATE OF ARKANSAS,  
*County of Sebastian, ss:*

T. W. M. Boone and I. H. Nakdimen, being each duly sworn, on oath depose and say: We are each of lawful age and are citizens of the State of Arkansas, and know the contents of the foregoing instrument to which we have attached our names. We each for himself say we are worth the sum of Five Thousand Dollars over and above all debts, liabilities and exemptions.

I. H. NAKDIMEN.  
T. W. M. BOONE.

Subscribed and sworn to before me this 8th day of July, 1915.

[SEAL.]

F. H. FENNESSY,  
*Notary Public.*

My commission expires January 16, 1916.

Bond approved and to operate as a supersedeas, 4th day of October, 1915.

E. A. McCULLOCH,  
*Chief Justice Supreme Court of Arkansas.*

Filed October 7, 1915. P. D. English, Cl'k, by J. H. Campbell,  
D. C.



486

*Writ of Error.*

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Arkansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the St. Louis, Iron Mountain and Southern Ry. Co. and C. A. Starbird, Administrator of the Estate of Adam Miller, Deceased, wherein was drawn in question the construction of an act of Congress of the United States, known as the act to regulate commerce, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such act; a manifest error hath happened to the great damage of the said St. Louis, Iron Mountain & Southern Railway Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

487 Witness the Honorable Edward Douglass White, Chief Justice of the United States, the 7 day of October in the year of our Lord, one thousand nine hundred and fifteen.

[The seal of the District Court of East. Dist. Ark., Western Division, U. S. A.]

SID B. REDDING,  
*Clerk U. S. District Court, East. Dist. of Arkansas,*  
By W. T. FEILD, Jr., D. C.

Allowed Oct. 7, 1915.

E. A. McCULLOCH,  
*Chief Justice Supreme Court of Arkansas.*

Filed October 7, 1915. P. D. English, Clerk, by J. H. Campbell,  
D. C.

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*Certificate of Lodgement.*

SUPREME COURT, STATE OF ARKANSAS, ss:

I, P. D. English, clerk of the said court, do hereby certify that there was lodged with me as such clerk on October 4, 1915, in the matter of St. Louis, Iron Mountain & Southern Railway Company, vs. C. A. Starbird, Administrator of the Estate of Adam Miller, Deceased:

1. The original bond of which a copy is herein set forth.

2. Copies of the writ of error, as herein set forth,—one for each defendant, and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Little Rock, Arkansas, this October 7, 1915.

[Seal of the Supreme Court of Arkansas.]

P. D. ENGLISH,  
*Clerk Supreme Court of Arkansas,*  
By J. H. CAMPBELL, D. C.

489 ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, Plaintiff in Error,

v.

C. A. STARBIRD, Administrator, Defendant in Error.

UNITED STATES OF AMERICA, ss:

The President of the United States to the Defendant in Error, C. A. Starbird, Greetings:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court, of the State of Arkansas, wherein the St. Louis Iron Mountain & Southern Railway Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error, should not be corrected and why speedy justice should not be done to parties in that behalf.

Witness the Chief Justice of the Supreme Court of Arkansas, this seventh day of October, 1915.

E. A. McCULLOCH,  
*Chief Justice Supreme Court of Arkansas.*

Attest:

P. D. ENGLISH,  
*Clerk of Supreme Court of Arkansas,*  
By J. H. CAMPBELL, D. C.

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VAN BUREN, ARKANSAS, October 22, 1915.

I, C. A. Starbird, defendant in error, in the above entitled cause, hereby acknowledge due service of the above citation, and enter appearance in the Supreme Court of the United States.

C. A. STARBIRD,  
*Administrator Estate of Adam Miller,*  
*Defendant in Error.*

Filed October 25th, 1915. P. D. English, Clerk, by J. H. Campbell, D. C.

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*Return to Writ of Error.*

UNITED STATES OF AMERICA, ss:

Supreme Court of Arkansas.

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Arkansas, in the City of Little Rock, this October 25, 1915.

[Seal of the Supreme Court of Arkansas.]

P. D. ENGLISH,  
*Clerk Supreme Court of Arkansas,*  
 By J. H. CAMPBELL, D. C.

*Costs of Suit.*

Costs Circuit Court of Crawford County not certified to this court.

Cost Supreme Court .....	\$25.50
Making Transcript pursuant to Writ of Error—for the Supreme Court of the United States .....	160.00

Paid by St. Louis I. M. &amp; S. Ry. Co.

P. D. ENGLISH, *Clerk,*  
 By J. H. CAMPBELL, D. C.

492

In the Supreme Court of the United States.

No. 694.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,  
Plaintiff in Error,

*vs.*

C. A. STARBIRD, Adm'r of the Estate of Adam Miller, Deceased,  
Defendant in Error.

*Stipulation.*

It is stipulated and agreed by and between Thomas B. Pryor, counsel for plaintiff in Error, and C. A. Starbird, Admr., of the Estate of Adam Miller deceased, Defendant in Error, that in order to save expense in the printing of the record herein, the following portions of the record may be omitted to-wit:

There being ten suits filed in this cause, being separate suit for each car of peaches, and all the complaints and answers being the same, with the exceptions of the amount sued for, and the initials and numbers of the cars in said suit, date of Bill of Lading, and shipment of cars, it is therefore agreed, that only one copy of the complaint and answer be printed, and that the date of all of the Bills of Lading in this case, initials and numbers of cars be copied and printed in the record from all the other Bills of Lading, and date of shipment, initials and number- of cars, and the amount claimed in each one of the complaints be copied and printed in the records; And that only one copy of the Bill of Lading, leaving out the map on the Bills of Lading, which is attached to each complaint, shall be printed; and that the date of shipment on each Bill of Lading, initials and number- of cars in every Bill of Lading be printed.

It is further agreed that the deposition of L. A. Taylor, witness for the plaintiff, be omitted, as it appears from his deposition that he knew nothing concerning the condition of the peaches on arrival at New York, or any thing material to this case.

It is further agreed that motions to require depositions to be taken out of the State to be taken on interrogatories and all orders of the Court with reference thereto be omitted, and that  
493 further pleadings or orders of the Court with reference to the following be omitted, to-wit:

Petition for change of venue, and all orders of the Court with reference thereto.

Motion to surpress deposition of L. A. Taylor, and all orders with reference thereto.

Motion to surpress deposition of Adam Miller, and all orders with reference thereto.

Motion to set aside deposition of Adam Miller, and affidavit in support thereof, together with all orders of the court, with reference thereto.

It is further stipulated and agreed that if from oversight or omission any necessary part of the record be not printed, that the plaintiff in Error has a right to print or may be required by Defendant in Error to print any further additional portions thereof.

The above ten suits were consolidated by the Court and all tried at the same time and together.

Witness our hands this 5th day of February, 1916.

THOS. B. PRYOR,  
*Counsel for Plaintiff in Error.*  
C. A. STARBIRD, *Adm'r,*  
*Defendant in Error.*

[Endorsed:] 694/24977. In the Supreme Court of the United States. No. 694. St. Louis, Iron Mt. & Sou. Ry. Co., Plaintiff in Error, vs. C. A. Starbird, Admr., Est. Adam Miller, Deceased, Defendant in Error. Stipulation.

494 [Endorsed]: File No. 24,977. Supreme Court U. S., October term, 1915. Term No. 694. St. Louis, Iron Mountain & Southern Ry. Co., Pl'ff in Error, vs. C. A. Starbird, Adm'r, etc. Stipulation to omit parts of record in printing. Filed February 9, 1916.

Endorsed on cover: File No. 24,977. Arkansas Supreme Court. Term No. 694. St. Louis, Iron Mountain & Southern Railway Company, plaintiff in error, vs. C. A. Starbird, administrator of the estate of Adam Miller, deceased. Filed November 5, 1915. File No. 24,977.

*Assignment and Prayer.*

In the Supreme Court of Arkansas.

C. A. STARBIRD, Special Adm'r Estate of Adam Miller, Deceased,  
Appellant,

vs.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY Co., Appellee.

Considering himself aggrieved by the final decision of the Supreme Court in rendering judgment against him in the above entitled cause, the appellant hereby prays the writ of error from the judgment and decision, to the United States Supreme Court.

And the said C. A. Starbird, Special Adm'r, as aforesaid assigns the following errors in the records and proceedings of said case:

I.

The Supreme Court of Arkansas erred in holding that the provision in the bill of lading in this case, to wit: "Claims for damages must be reported by consignee in writing to the delivering line within thirty six hours after the consignee has been notified of the arrival of the freight at place of delivery. If such notice is not there given, neither this company nor any of the connecting or intermediate carriers shall be liable."

Because the above provision is against the Act of Congress passed March 4th, 1915, which provides: "That if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

Because the provision is unreasonable in that it gives too short a time under the circumstances in this case to give the notice mentioned in the stipulation.

Because it is against the act of the State of Arkansas passed April 30th, 1907.

Because it is against the Hepburn Act and the Carmack Amendments thereto.

Because it limits the appellee's liability and is contrary to the common law.

Because there was no consideration for said stipulation in bill of lading and it was the general form used by the appellee.

Because there is no agent of appellee named in the stipulation upon whom to serve the notice therein mentioned.

Because the appellee had actual knowledge of the damaged condition of the peaches in the five cars which this court reversed the judgment of the lower court.

Because the judgment of the lower court was based upon ample testimony.

Because the stipulation was substantially complied with.

Because the court erred in reversing the judgment of the lower court, as to the five cars Nos. A. R. T. 8787, 9737, 9089, 9478, 8711, and in rendering the judgment against the appellant on those cars.

For which errors appellant prays that said judgment of the Supreme Court of Arkansas, dated June 15th, 1915, be reversed and judgment rendered in favor of appellants for those cars.

ROBERT A. ROWE,  
*Attorney for Appellant.*

Writ of error granted on execution of bond for cost in sum of one hundred dollars. This Nov. 23, 1916.

E. A. McCULLOCH,  
*Chief Justice of the Supreme Court of Arkansas.*

Filed Nov. 23, 1916. W. P. Sadler, Cl'k. By J. H. Campbell,  
D. C.

*Writ of Error.*

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Arkansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suits between the C. A. Starbird, Special Administrator of the estate of Adam Miller, deceased, and the St. Louis, Iron Mountain & Southern Ry. Co., wherein was drawn in question the construction of an Act of Congress of the United States, known as the Act to regulate commerce, and decision was against the title, right, privilege, or exemption specially set up or claimed under such Act; a manifest error hath happened to the great damage of the said C. A. Starbird, Special Administrator of Adam Miller, deceased, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and fully — speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof, that the records and proceedings aforesaid be inspected, the said Supreme Court may cause further to be done therein to correct that error, what or right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, the 23 day of November, 1916, the year of our Lord, one thousand nine hundred sixteen.

[The Seal of the District Court, Western Division, U. S. A.,  
of East. Dist. Ark.]

SID. B. REDDING,  
*Clerk U. S. District Court, East. Dist. of Arkansas,*  
By W. P. FEILD, JR., D. C.



Let the writ be issued.

C. A. McCULLOCH,

*Chief Justice of the Supreme Court of Arkansas.*

Filed Nov. 23, 1916. W. P. Sadler, Cl'k. By J. H. Campbell,  
D. C.

C. A. STARBIRD, Special Administrator, Plaintiff in Error,

vs.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY,  
Defendant in Error.

UNITED STATES OF AMERICA, ss:

The President of the United States to the Defendant in Error, St.  
Louis, Iron Mountain and Southern Railway Co., Defendant in  
error, Greetings:

You are hereby cited and admonished to be and appear at and  
before the Supreme Court of the United States, at Washington, D. C.  
within 30 days of the date hereof, pursuant to a Writ of Error, filed  
in the Office of the Clerk of the Supreme Court of the State of Arkan-  
sas, wherein *the* C. A. Starbird, Special Administrator of Adam Mil-  
ler, deceased, Plaintiff in Error, and you — Defendant in Error, to  
show Cause, if any there be, why the Judgment rendered against  
the said Plaintiff in Error, as in said Writ of Error, shall not be  
corrected and why speedy justice should not be done to parties in that  
behalf.

Witness the Chief Justice of the Supreme Court of Arkansas, this  
23rd day of November, 1916.

E. A. McCULLOCH,

*Chief Justice of the Supreme Court of Arkansas.*

Attest:

W. P. SADLER,

*Clerk of Supreme Court of Arkansas,*

By J. H. CAMPBELL, D. C.

I hereby acknowledge service of the foregoing citation this 24th  
day of November, 1916.

THOS. B. PRYOR,

*Attorney for St. L., I. M. & S. Ry.*

Filed Nov. 25, 1916. W. P. Sadler, Cl'k. By J. H. Campbell,  
D. C.

Wm. P. Sadler, Clerk; James H. Campbell, Deputy; Carl R.  
Stevenson, Deputy; Peyton D. English, Assistant.

Edgar A. McCulloch, Chief Justice; Carroll D. Wood, Jesse C.  
Hart, William F. Kirby, Frank G. Smith, Judges; James V. John-  
son, Reporter.

Supreme Court of the State of Arkansas.

[Vignette.]

1836.

LITTLE ROCK, Nov. 25, 1916.

SUPREME COURT,  
*State of Arkansas, ss:*

I, W. P. Sadler, clerk of said court, do hereby certify that there was lodged with me as such clerk on November 23rd, 1916, in the matter of C. A. Starbird, Special Adm'r Estate of Adam Miller, deceased, Appellant, v. St. Louis, Iron Mountain & Southern Railway Co., Appellee:

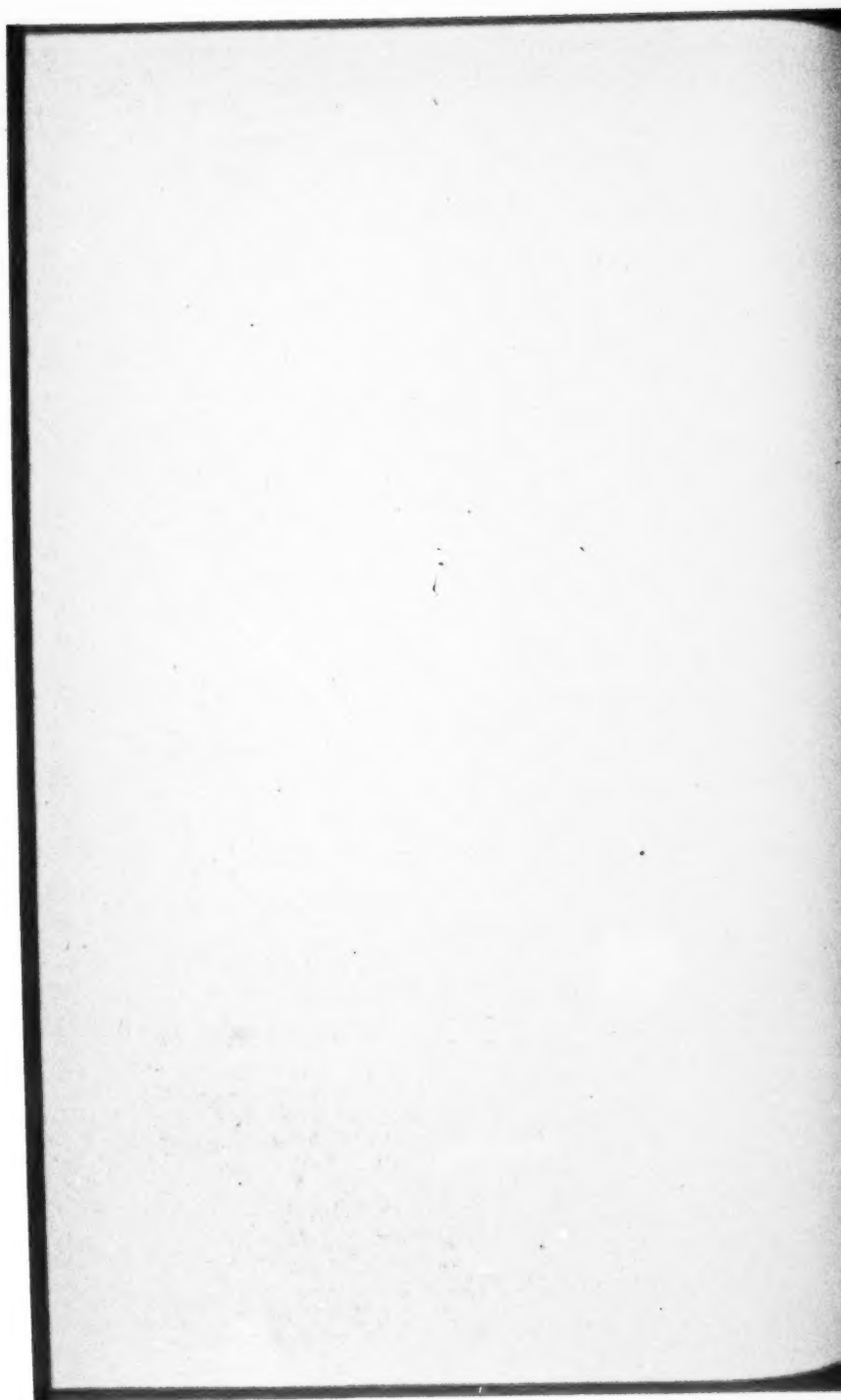
1. The original bond of which a copy is herein set forth.
3. Three copies of the writ of error, as herein set forth—one for each defendant, and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Little Rock, Arkansas, this November 25th, 1916.

[Seal of the Supreme Court, Arkansas.]

W. P. SADLER,  
*Clerk Supreme Court of Arkansas,*  
By J. H. CAMPBELL, D. C.

[Endorsed:] 796/25,626.



FILED  
MAY 31 1916  
JAMES D. MAHER  
CLERK

No. **275**

IN THE  
Supreme Court of the United States  
OCTOBER TERM, 1915.

Error to the Supreme Court of the State of  
Arkansas.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN  
RAILWAY COMPANY, PLAINTIFF  
IN ERROR,

VS.

C. A. STARRIRD, SPECIAL ADMINISTRATOR  
OF THE ESTATE OF ADAM MILLER,  
DECEASED, DEFENDANT  
IN ERROR.

RESPONSE TO MOTION TO DISMISS OR  
AFFIRM, AND BRIEF AND ARGUMENT.

EDW. J. WHITE,  
THOS. D. PRYOR,  
Attorneys for Plaintiff in Error.

No. 694

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

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Error to the Supreme Court of the State of  
Arkansas.

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ST. LOUIS, IRON MOUNTAIN & SOUTHERN  
RAILWAY COMPANY, PLAINTIFF  
IN ERROR,

vs.

A. STARBIRD, SPECIAL ADMINISTRATOR  
OF THE ESTATE OF ADAM MILLER,  
DECEASED, DEFENDANT  
IN ERROR.

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RESPONSE TO MOTION TO DISMISS OR  
AFFIRM.

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Comes the St. Louis, Iron Mountain & Southern  
Railway Company, Plaintiff in Error, and for re-  
sponse to motion filed herein by defendant in error  
to dismiss the writ of error or to affirm the de-  
cision of the Supreme Court of the State of Ar-  
kansas, states:

That the only ground upon which the defend-

ant in error suggests that the writ of error allowed herein by the Chief Justice of the Supreme Court of Arkansas should be dismissed is, as alleged, that the writ of error does not draw in question the validity of a treaty or statute or authority exercised under the United States, nor was its decision against the validity of any such treaty, statute or authority.

The complaint in this case, as shown by the record (t-1) alleges that the shipment of the can of peaches involved in this case were shipped in July, 1907, under a contract entered into covering the carriage of such shipments from Greenwood in the State of Arkansas, to New York City, in the State of New York, the shipments therefore being interstate, and as repeatedly held by the Court, the only law applicable to contracts of shipments of this character is the Act of Congress known as the Act to Regulate Commerce, with the amendments thereto.

This suit was instituted and the right of recovery based upon the Carmack amendment to the Hepburn Act, as it is sought, to hold the initial carrier liable for all damages sustained by such shipments.

The opening paragraph of the complaint is as follows: "That the defendant, St. Louis, Iron Mountain & Southern Railway Company, is liable and at the several times hereinafter set forth,

corporation organized under the laws of the State of Arkansas, and was at said times the owner, lessee, operator and manager of a line of railway from the town of Greenwood, Arkansas to the city of St. Louis, Mo., with some kind of an arrangement unknown to the plaintiffs to transport said peaches from there to the City of New York by railway and water and that said defendant company was a common carrier of goods and property."

The provisions in the bill of lading, which was attached to the complaint and made a part thereof, among other things provides, "Claims for damages must be reported by the consignee in writing to the delivering line within thirty-six hours after the consignee has been notified of the arrival of the freight at the place of delivery, and if such notice is not there given, neither this company nor any of the connecting or intermediate carriers shall be liable." The construction of this provision of the contract of shipment we submit is a Federal question under the Act of Congress known as the "Act to Regulate Interstate Commerce."

For response to the suggestion that the writ of error was sued out for delay only and in response to paragraph Four of Defendant in Error's motion asking that the judgment of the Supreme Court of Arkansas be affirmed "On the



ground that it appears from the record that said judgment is in accordance with the decisions of this Court and that it is manifest that the writ of error herein was taken for delay only," Plaintiff in Error states: that the writ of error was sued out in good faith and not for delay and that it presents questions that as far as counsel for Plaintiff in Error is advised, have not been decided by this Court.

The assignments of errors, as shown in the printed brief of Defendant in Error, are not copied in full, as the Act of Congress was called to the attention of the Court in said assignment of errors (Record p. 152), also in petition for rehearing (R. p. 146) and also in motion for new trial filed in the trial court (R. p. 136), the 14th ground thereof being as follows: "That under the Act of Congress and the amendment thereto of June 29, 1906, amendatory of the Act regulating Interstate Commerce, the defendant is not liable under the evidence adduced on the various shipments alleged."

EDW. J. WHITE,  
THOS. B. PRYOR,

Attorneys for Plaintiff in Error.

## BRIEF AND ARGUMENT

### FEDERAL QUESTION.

We do not deem it necessary, in view of the record in this case, which discloses that the shipments were interstate, to take more than a passing notice of the contention of counsel for Defendant in Error, that there is no Federal question involved. It is obvious from the record in this case that if it had not been for the Carmack amendment to the Hepburn Act, making the initial carrier liable, there would be no evidence on which to base a recovery as against the Plaintiff in Error. This Court in the case of *Southern R. Co. vs. Prescott*, decided April 10th, 1916, in an opinion delivered by Mr. Justice Hughes, states: "As the shipment was interstate and the bill of lading was issued pursuant to Federal Act, the question as to whether the contract thus set forth had been discharged was necessarily a federal question." "Viewing the contract set forth in the bill of lading as still in force, the measure of liability under it must also be regarded as a federal question, as it has often been said that the statutory provision manifest the intent of Congress that the obligation of the carrier with respect to the services within the purview of the statute shall be governed by uniform rule in the place of diverse requirements of state legislation and decisions." (Citing numerous decisions of this Court.)

The contract as set forth in the bill of lading was specially plead by the defendant in error in his complaint (T. 4), and admitted in the answer and the construction of the bill of lading under the Act of Congress was made ground of motion for a new trial in the trial court, also in petition for a hearing in Supreme Court.

### **PROVISION IN BILL OF LADING.**

The bill of lading contained the following provision: "Claims for damages must be reported by the consignee in writing to the delivering line within thirty-six hours after the consignee has been notified of the arrival of the freight at the place of delivery. If such notice is not there given, neither this company nor any of the connecting intermediate carriers shall be liable." The Supreme Court of Arkansas in construing this provision of the bill of lading says: "The purpose of this notice is manifest, and has been stated in our decisions upholding it. Its object is that the carrier may inspect the goods and ascertain the nature and extent of the damage while the truth in regard to any claim for damages may be known. But where the carrier possesses this information independently of the notice, the giving of the notice can serve no necessary purpose. It is insisted that the carrier should be charged with notice of any information possessed by any of its servants or agents."

6

employees. But we cannot agree with this contention. None of our cases hold, nor has it been so held in the decisions of any other jurisdiction of which we are aware. To so hold would render the provisions in regard to notice practically nugatory. In the present case the laborers who unloaded the cars were called longshoremen, and some of these men unquestionably knew that some of the peaches contained in the cars were in a damaged condition; but this is not the knowledge contemplated by the bill of lading. To comply with the terms of the bill of lading it is essential, either that the notice be given to the company in writing, or if this is not done, that personal notice be given to that employee or agent of the company whose duty it would be, if written notice had been received, to make the inspection to ascertain the nature and extent of the damage, if such employee or agent does not already possess this knowledge. But, notwithstanding this fact, we do not hold the Railroad Company liable for the first five mentioned cars, because the proof does not show that this inspector had any duty to perform concerning them. On the other hand, we cannot assume that there is any uncertainty about Miller's purpose in hunting up the dock foreman and reporting to him the condition of the five remaining cars and in going with this foreman to the piles of peaches about which the complaint was being made. The proof

does not show that Miller stated to the dock man that it was his intention to sue for the damage to the peaches; but it is not indispensable that written notice should have contained this statement. The purpose and effect of Miller's statement to the foreman was to advise the representative of the delivering carrier in authority of the fact that damage had been done, and the giving of this notice under the circumstances must be held sufficient to charge the delivering carrier with knowledge of the fact that compensation would be claimed." It will be noted from this statement in construing this provision of the contract, the Supreme Court of Arkansas held that knowledge on the part of the dock foreman of the damaged condition of the peaches was sufficient of itself to relieve the consignee of the necessity of complying with the contract by giving notice of an intention to claim damages. It is upon this construction of the contract that assignment of errors Nos. 1 and 2 are based, and the only evidence as to the authority of the dock foreman is found in the deposition of Malcolm Townsend, agent for the delivering line, The Pennsylvania Railroad Company, in the City of New York. In answer to interrogatory No. 13 he states: "When the peaches were unloaded by the Railroad from the cars on the piers in New York City, they were put in Mr. Miller's partitioned section on the pier, and from that time they were

under the exclusive jurisdiction of the consignee (Mr. Miller) and he inspected, examined, sorted and distributed them as much as he pleased—the railroad offering no interference whatever, that section of Mr. Miller's being virtually his own store or warehouse. The dock foreman was not the agent of the Pennsylvania Railroad in any sense of the word; if any complaint of any kind as to the condition of the peaches had been made by Adam Miller or his representatives, it certainly would have come to me, and I can state that no such complaint ever reached me. (Rec. p. 125.)” He further states in his deposition that Adam Miller received the cars and gave his receipts for same without any exception being taken as to the condition and that he never had any knowledge that it was claimed that the peaches were received in a damaged condition or that any claim was being made for damages until after the institution of this suit (Rec. p. 125.) This provision relative to giving notice, provided for in the bill of lading, as far as the shipment of peaches is concerned, was first construed by the Supreme Court of Arkansas in the case of St. L. & S. F. R. Co. vs. Kellar, 90 Ark., p. 308, in which the Court says: “The contract of shipment in this case specifically provided that, before a recovery could be had, a notice in writing must be given of loss or damage within thirty hours after the arrival of the peaches at destination and their

delivery; that is to say, a notice of the intention to claim damages must be so given. And in this case such notice was not given. \* \* \* Mr. Hutchinson, in his work on carriers (3d Ed.), 442, says: "It is frequently the custom for the carrier to insert in the contract of shipment a condition that, in the event of loss, the owner shall give notice of his claim within a specified time. Such conditions are usually to the effect that the notice shall be in writing and presented to some officer or agent of the carrier, either before the goods are removed from the point of destination, or within a certain time thereafter, or within a designated time after loss has occurred; and, when such conditions are reasonable, the owner will be precluded from the right to maintain an action against the carrier unless he has presented the notice within the time stated and in the manner provided. The object of conditions of this character, it is said, is to enable the carrier while the occurrence is recent, to better inform himself of what the actual facts occasioning the loss or injury were, and thus protect himself against claims which might be made upon him after such a lapse of time as to frequently make it difficult, if not impossible for him to ascertain the truth. It is just, therefore, that the owner, when the loss or injury has occurred, should be required, as a condition precedent to enforcing the carrier's liability, to give notice of his claim according to the



reasonable conditions of the contract. And thus it will be seen that this provision is a condition of recovery, and not an exemption from liability. Its effect is to require the one who has the peculiar knowledge to inform the other who has not that knowledge to seek the facts while they exist, so that the facts may be obtained and presented by both sides; its effect is, therefore, to uphold and enforce rights if they are founded on truth, and not to limit or defeat those rights. 6 Cyc., 505; Kalina vs. Union Pac. Railroad Co., 69 Kan., 172; The Westminster, 127 Fed., 680. \* \* \* Under the circumstances of this case, we think this provision for notice was reasonable. The shipper delivered for carriage perishable goods which were packed in baskets and crates, so that any damage to them was not discoverable until they were unpacked. The carrier had an innumerable amount of shipments, so that it would have been impracticable, if not impossible, for the carrier to examine each shipment to discover whether injury or damage had been sustained by it. And neither the contract, nor usage, nor reason demands of the carrier such inspection, even if he had the right to break packages for such examination. In this case, after the arrival and delivery of the goods at New York, the party named as consignee, and who received the peaches, gave to the carrier a written receipt in which he stated that the peaches were then in good condition.

This was prima facie evidence of this fact of the condition of the peaches. (6 Cyc., 505.) And while that could be controverted or explained by testimony, it nevertheless shows the reasonableness of the provision requiring the giving of the notice of claim of damage within the time specified. For here, in the first place, the carrier had no opportunity to examine the condition of the peaches, and then the shipper gives him a written statement, saying that they are in good condition, and thus lulled the carrier into inaction, if he had the opportunity of inspection. \* \* \* \*

“Under all the circumstances of this case this stipulation of the contract was reasonable; and under the repeated decisions of this court it was valid and binding. And in this case, therefore, it must be upheld, if it is not invalidated by the provisions of the Act of Congress, known as the “Hepburn Act,” above referred to, making the initial carrier liable for damages to property received by it for transportation caused by any connecting carrier and providing that “no contract, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed.”

“In the case of *St. Louis, Iron Mountain & Southern Railway Company vs. Furlow*, decided by this Court on March 1st, 1909, and reported in 88 Ark., 404, we held that a stipulation in a contract of shipment requiring a notice of damage to be

given, similar to the one involved in this suit, was not invalidated by any provision of the Hepburn Act. In that case we said: "The stipulation in question does not exempt the defendant from liability imposed by that Act, which extended the liability of the initial carrier for loss, damage or injury to property while in course of transportation over the line of a connecting carrier. Before it was enacted an initial carrier could not exempt itself from such liability for loss, damage or injury incurred on its own line, yet it was lawful for it to enter into stipulations like the one in question when the shipment of property was confined to its own line. For the same reason it can enter into such stipulations under the Hepburn Act as to loss, damage or injury suffered on the line of a connecting carrier." \* \* \* \*

"It therefore follows that the stipulation in the contract of shipment in this case requiring a notice to be given of the claim of damage within the time therein specified is reasonable and valid; and upon the failure to give that notice the plaintiff was not entitled to recover."

There is nothing in the facts to distinguish this case from the Kellar case except the testimony on the part of Adam Miller to the effect that he called the dock foreman's attention to the damaged condition of the fruit on arrival. There was no attempt made to prove that any written or verbal no-

tice was given of an intention to claim damages. The Supreme Court of Arkansas in the case of Western Union Telegraph Company vs. Moxley, 80 Ark., 561-2, in construing a similar provision in a contract covering the transmission of a telegram says: "It seems clear that the meaning of this is that the plaintiff shall present his claim for damages, within the time named, or the company will not be liable therefor, and the courts so hold. (Manner vs. Western Union Tel. Co., 94 Tenn., 448; Western Union Tel. Co. vs. Murray, 68 S. W., 549.) As to the reasons on which such stipulations are based, see Express Co. vs. Caldwell, 21 Wall., 64. There is a clear distinction between a notice of negligence and a claim for damages. It is no doubt often the case that notice is given to this company concerning the negligence of its employees in transmitting and delivering telegrams and complaint made thereof without any thought of making a claim for damages."

"A mere notice to the company that its employees have been negligent, with the circumstances thereof, is a very different thing from a presentment of a claim for damages based on such negligence, and to hold that a stipulation which requires a presentment of the claim for damages in writing is satisfied by a notice of negligence on which the claim is based would do violence to the language used, and be in effect making a different

contract between these parties. It may be that notice of the negligence would be as beneficial to the company as a presentment of the claim, but the parties have contracted for the one and not the other, and we have no right to say that the company must be satisfied with something other than a presentment of the plaintiff's claim because we think the other could subserve the same purpose. The company has a right to stand on its contract."

The language of the Supreme Court in the case just quoted from, is applicable to the contract and facts in this case. The Supreme Court in its opinion in this case virtually makes a contract entirely different from the contract of shipment existing between the parties to this suit. The contract provides that a notice of an intention to claim damages should be given. The Supreme Court of Arkansas says, in fact, that it is not necessary to comply with the provisions of this contract but if the dock foreman had knowledge of the damaged condition of the peaches, this of itself would be sufficient to apprise the carrier that a claim would be made for damages. We submit, as stated by the Court in the case referred to, "The Company has a right to stand on its contract," and the contract expressly provides that a written notice of an intention to claim damages should be given. As stated in the Kellar case referred to, the stipula-

tion does not exempt the carrier from liability but merely requires as a condition precedent that a notice of an intention to claim damages, in writing, should be given. Congress evidently took note of the fact that the courts of the country were upholding the validity of provisions of this character in bills of lading, as it amended the Act of June 28th, 1906, by the Act of March 4th, 1915, by adding the following provision to the Act: "That if the loss, damage or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery." This amendment to the Act of Congress is not retroactive and as provided in Section Two, the Act did not take effect until ninety days after its passage.

### **ASSIGNMENT OF ERROR NO. 3.**

This assignment of error called the attention of the Supreme Court of Arkansas to the provision of Section 16 of the Act of Congress which provides that all complaints to recover damages shall be filed within two years from the time the cause of action accrued. As the record shows these suits were not filed in the Crawford Circuit Court, from which the appeal herein was taken, until July, 1910. The amendment of March 4th, 1915, referred

to, contained the further provision "That it shall be unlawful for any such common carrier to provide by rule, contract, regulation or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years." As shown by what is termed "History of the Case," in the brief filed herein on behalf of defendant in error, these suits were not filed in the Crawford Circuit Court until the 18th day of July, 1910, there is nothing in the entire record in this case to show that the suits were ever filed before that time and therefore no basis in the record for the statement of the Supreme Court of Arkansas, "The suits embraced in this appeal were originally begun on the 7th of April, 1908, and those causes were removed to the Federal Court, Western District, of this State, where non-suits were taken in July, 1910. And thereafter the suits were again brought in the Greenwood District of the Sebastian Circuit Court." However, if these statements were supported by the record, there is no provision in the Act of Congress which provides for filing a suit and afterwards taking a non-suit, and rebringing the suit after it is barred by the period of limitation prescribed by the Act, and the Supreme Court of Arkansas failed to directly pass upon this question of limitation, although it was raised in the answer and in pe-



tition for rehearing. This court in the case of *A. J. Phillips Company vs. Grand Trunk Western Ry. Co.*, opinion delivered March 15th, 1915, by Mr. Justice Lamar, in passing upon the question as to whether or not a carrier could waive the statute that requires the presentation of claims to the Commission within two years, says:

“It is argued, however, that under the conformity Act (Rev. Stat., Sec. 914; Comp. Stat. 1913, Sec. 1537), the case is to be governed by the Michigan practice, which does not permit a defendant to take advantage of the statute of limitations by a general demurrer to the declaration. But that rule does not apply to a cause of action arising under a statute which indicates its purpose to prevent suits on delayed claims, by the provision that all complaints for damages should be filed within two years, **and not after**. Under such a statute the lapse of time not only bars the remedy, but destroys the liability (*Finn vs. United States*, 123 U. S., 227, 232; 31 L. Ed., 128, 130; 8 Sup. Ct. Rep., 82), **whether complaint is filed with the Commission or suit is brought in a court of competent jurisdiction**. This will more distinctly appear by considering the requirements of uniformity, which in this, as in so many other instances, must be borne in mind in construing the commerce act. The obligation of the carrier to adhere to the legal rate, to refund only what is permitted by law, and to treat all shippers alike, would have made it illegal for the carriers, either by silence or by express waiver, to preserve to the Phillips Company a

right of action which the statute required should be asserted within a fixed period. To have one period of limitation where the complaint is filed before the Commission, and the varying periods of limitation of the different states, where a suit was brought in a court of competent jurisdiction; or to permit a railroad company to plead the statute of limitations as against some, and to waive it as against others, would be to prefer some and discriminate against others, in violation of the terms of the commerce act, which forbids all devices by which such results may be accomplished. The prohibitions of the statute against unjust discrimination relate not only to inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent judgments, or the waiver of defenses open to the carrier. The railroad company, therefore, was bound to claim the benefit of the statute here, and could do so here by general demurrer." (59 U. S. L. Ed., page 444.)

We submit that under this opinion that these suits to recover damages, filed July 18th, 1910, for damages alleged to have accrued in July, 1907, were filed too late to enforce liability, if any existed.

#### **ASSIGNMENTS OF ERROR NOS. 5 AND 6.**

We do not deem it necessary at this time to discuss these assignments of errors, as the defendant in error in its motion to affirm has made no reference whatever to the evidence as shown by the

record in this case, and statement of counsel for defendant in error, that the appeal "was taken for delay only," is made without reference to the facts.

We respectfully submit that the motion of defendant in error should be denied.

Respectfully submitted,

EDW. J. WHITE,

THOS. B. PRYOR,

Attorneys for Plaintiff in Error.

Office Supreme Court, U. S.

FILED

DEC 5 1916

JAMES D. MAHER

CLERK

IN THE

**SUPREME COURT OF THE UNITED STATES.**

OCTOBER TERM, 1916.

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**No. 275.**

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ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAIL-  
WAY COMPANY, PLAINTIFF IN ERROR,

*vs.*

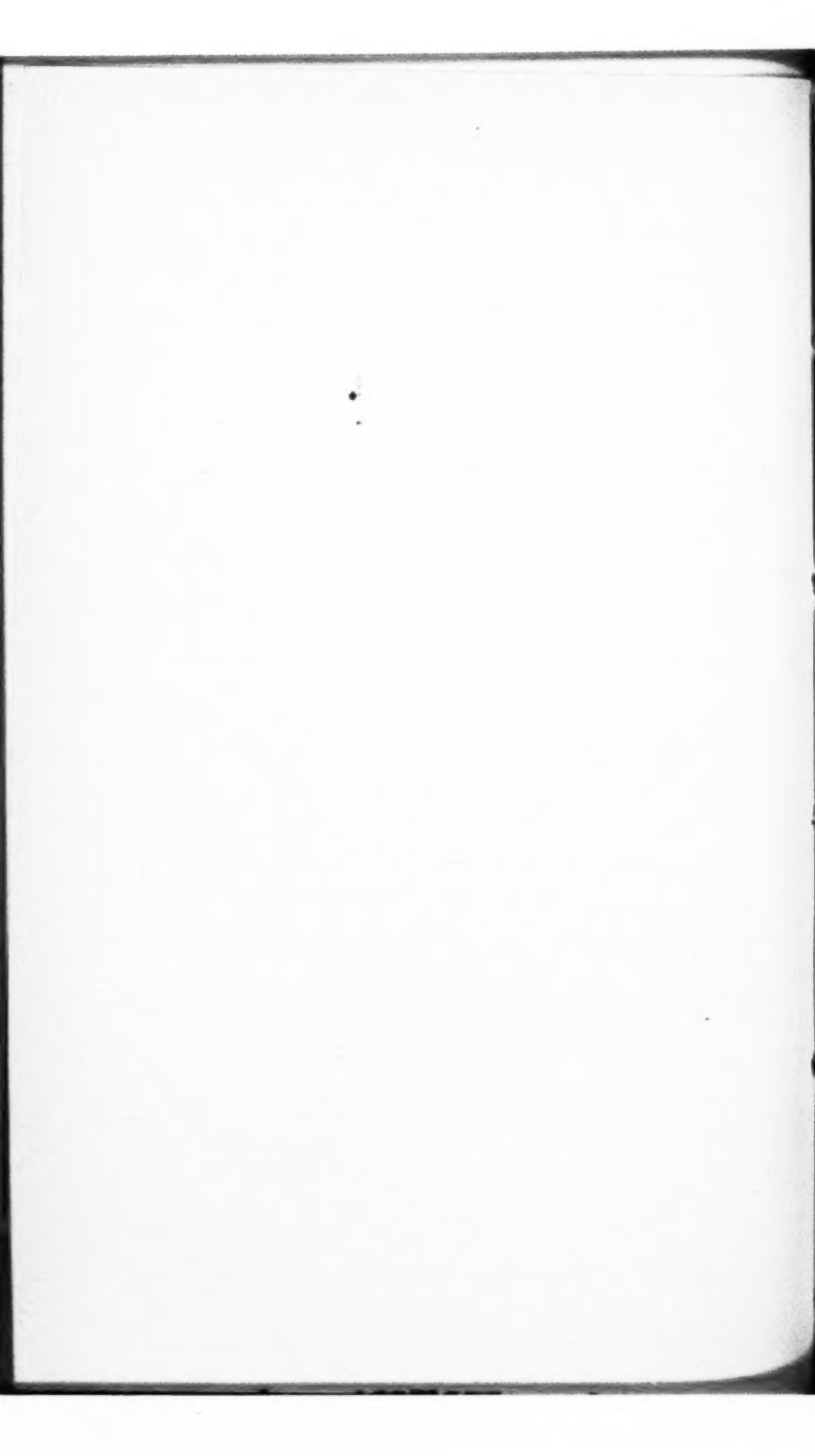
C. A. STARBIRD, SPECIAL ADMINISTRATOR OF THE ESTATE  
OF ADAM MILLER, DECEASED, DEFENDANT IN ERROR.

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**STATEMENT, ABSTRACT, BRIEF AND ARGUMENT  
FOR PLAINTIFF IN ERROR.**

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EDW. J. WHITE,  
THOS. B. PRYOR,  
*Attorneys for Plaintiff in Error.*



IN THE  
SUPREME COURT OF THE UNITED STATES.  
OCTOBER TERM, 1916.

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**No. 275.**

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ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAIL-  
WAY COMPANY, PLAINTIFF IN ERROR,

*vs.*

C. A. STARBIRD, ADMINISTRATOR OF THE ESTATE OF  
ADAM MILLER, DECEASED.

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**STATEMENT, ABSTRACT, BRIEF AND ARGUMENT  
FOR PLAINTIFF IN ERROR.**

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**Statement.**

This suit involves the construction of a provision in a bill of lading covering the shipment of ten cars of peaches from Greenwood, Arkansas, to New York city, New York, shipped in July, 1907. It is alleged in the complaint:

"That the defendant St. Louis, Iron Mountain & Southern Railway Company is now and was at the several times hereinafter set forth a corporation, organized under the laws of the State of Arkansas, and

was at said times the owner, lessee, operator, and manager of a line of railway from the town of Greenwood, Arkansas, to the city of St. Louis, Missouri, with some kind of an arrangement unknown to the plaintiff to transport said peaches from there to the city of New York" (R., p. 1).

It is further alleged that the peaches arrived in a damaged condition. A copy of the bill of lading is attached to the complaint and contains the following provision:

"Claims for damages must be reported by consignee in writing to the delivering line within 36 hours after consignee has been notified of the arrival of the freight at the place of delivery. If such notice is not given, neither this company nor any of the connecting or intermediate carriers shall be liable."

The answer denied specifically the allegations of negligence and damages and plead the failure to comply with the provision of the bill of lading, and also plead the two-year statute of limitations provided by the interstate commerce act (R., pp. 10-11).

There was judgment for the plaintiff on each car in the trial court, and defendant filed its motion for a new trial in said court, and in the fourteenth paragraph thereof alleged:

"That under the act of Congress and the amendment thereto of June 29, 1906, amendatory of the Act Regulating Interstate Commerce, the defendant is not liable under the evidence adduced on the various shipments alleged."

On appeal to the Supreme Court, judgment of the lower court was affirmed as to five of the cars and reversed and dismissed as to the other five. (See opinion, R., p. 147.)

Appellant filed its petition for rehearing, and paragraphs III, IV, V, and VII thereof are as follows:

"III. The court erred in holding and deciding that the delivering carrier had actual knowledge of the



damaged condition in which the peaches arrived that were shipped in A. R. T. cars Nos. 10640, 8683, 10875, 10542, and 10052.

"IV. That the court erred in holding and deciding that knowledge of the dock foreman of the damaged condition of the peaches was sufficient, of itself, to convey notice to the delivering carrier that the consignee would present a claim for damages.

"V. That the court erred in refusing to hold and decide that the written notice of an intention to claim damages, provided for in the bill of lading, was necessary to be given before the plaintiff would be entitled to recover.

"VII. The court erred in refusing to hold and decide that the plaintiff was barred from recovering in these suits under the provisions of section 16 of the act of Congress, which provides that all complaints to recover damages shall be filed within two years from the time the cause of action accrues. As the record shows, these suits were not filed in the Crawford County Circuit Court, from which the appeal herein was taken, until July, 1910."

Petition for rehearing overruled.

Plaintiff in error then filed its assignment of errors, which is as follows:

### I.

That the Supreme Court of Arkansas erred in holding and deciding that it is unnecessary for the plaintiff in error to show that the consignee had complied with the provisions of the bill of lading which required written notice of an intention to claim damages to be given to the agent of the delivering line at destination or to the agent of the initial carrier at the point of origin to entitle plaintiff to recover. Said shipments being interstate and governed by an act of Congress, known as an "Act to Regulate Commerce."

## II.

The court erred in holding and deciding that knowledge of the dock foreman of the damaged condition of the peaches upon arrival at destination was sufficient of itself to convey notice to the delivering carrier that the consignee would present a claim for damages, and that such knowledge on the part of the dock foreman that it would be unnecessary for the consignee to comply with the provisions of the bill of lading which required the consignee to give notice in writing, within thirty-six hours after notice of arrival of shipment at destination, of an intention to claim damages; said provision of the bill of lading being reasonable under the provisions of the act of Congress known as "An Act to Regulate Commerce."

## III.

That the court erred in refusing to hold and decide that the plaintiff was not barred from recovering in these suits under the provision of section 16 of the act of Congress which provides that all complaints to recover damage shall be filed within two years from the time the cause of action accrues. As the record shows these suits were not filed in the Crawford County Circuit Court, from which the appeal herein was taken, until July, 1910.

## IV.

That the court erred in holding and deciding that the delivering carrier had actual knowledge of the damaged condition in which the peaches arrived that were shipped in A. R. T. cars Nos. 10640, 8683, 10875, 10542, and 10052.

## V.

That the court erred in affirming the judgment of the lower court, as to the five cars numbered A. R. T. 10640, 8683, 10875, 10542, and 10052, and in rendering judgment against the appellant for the amount of the alleged loss on said five cars of peaches.

**Abstract of Findings of Fact as Shown by Opinion of  
Supreme Court.**

1. There was proof that the peaches were damaged.
2. The proof was insufficient to sustain the allegation in the complaint that a written notice had been given of the damage.
3. The custom was that if the peaches were sound they were sold at the dock and were usually gotten rid of before noon of the day of their receipt, but if many of them were bad and had to be sorted out, the authorities at the dock required the consignee to haul the peaches to their place of business.
4. That as to the cars involved in defendant in error's cross-appeal there was no evidence that the delivering carrier had any knowledge of the damaged condition of the peaches.
5. That as to the remaining cars, for which judgment was affirmed, the dock foreman's attention was called to the damaged condition of the peaches.
6. The proof does not show that Miller stated to the dock foreman that it was his intention to sue for the damage to the peaches.
7. That the provision of the bill of lading as to the giving of notice was reasonable and valid (R., pp. 147-150).

The court's finding of fact that the provision of the bill of lading was not complied with is supported by the uncontradicted evidence. J. S. Tustin, freight agent for the de-

fendant (below), testified that he had no knowledge whatever that plaintiff claimed any damage to the peaches until this suit was filed; that an investigation would have immediately been made if such notice had been given; that "these peaches were received in due course of business by the St. Louis, Iron Mountain & Southern Railway, were transmitted over the lines of the St. Louis, Iron Mountain & Southern Railway and the Missouri Pacific Railway Company and delivered to consignees or connecting carriers without exception, objection or protest of any kind and were believed to have been properly delivered until suit was filed against the St. Louis, Iron Mountain & Southern Railway Company in this case" (R., p. 108).

Malcom Townsend, agent at New York city of the Pennsylvania Railroad Company (the delivering line), testified that no notice was served upon him of any claim for damages. "I never had any knowledge that these peaches were received by Adam Miller in a damaged condition, and never knew he claimed they were received in a damaged condition" (R., p. 125); that "Piers 27, 28, and 29 in New York city constituted one station under my jurisdiction as agent at that time" (R., p. 124).

He further states: "We do not demand a receipt as soon as the goods are delivered to the particular section of each consignee. The receipt is not demanded until after the consignee has had all the opportunity he wishes to assort and inspect the goods and make complaint, if any, to the railroad. The receipt is not demanded, in other words, until the consignee has made sale of the goods to his customers and they are being taken away from the piers by such customers or by the trucks of the consignee" (R., p. 127). He further testified that Adam Miller gave him receipts for these cars of peaches without exception (R., p. 125).

## BRIEF AND ARGUMENT.

The facts, as found by the Supreme Court in this case, and as shown by the undisputed evidence, are that the provision of the bill of lading was not complied with by the consignee as to any of the ten cars involved in this suit. The judgment of the trial court was reversed and dismissed as to five of the cars because the consignee testified, in effect, that he did not know whether or not the delivering carrier had knowledge of the damaged condition of the peaches, and affirmed the judgment of the trial court as to the other five cars because the dock foreman's attention was called to the damaged condition of the peaches.

There is no evidence of finding by the court as to the duties or authority of the dock foreman, except that of the agent of the delivering line that, "He was not the agent of the Pennsylvania Railroad Company in any sense of the word" (R., p. 125).

But the Supreme Court did find that no statement was made, even to the dock foreman, of an intention to sue for damages.

There has never been any contention as to the language of the provision in the bill of lading. It appears in the bill of lading itself, and in the complaint it is correctly quoted, and also in the answer of the defendant, and it is again copied in the first paragraph of "Brief and Argument" of defendant in error herein, as follows:

"Claims for damage must be reported by consignee in writing to the delivering line, within thirty-six hours after consignee has been notified of the arrival of the freight at the place of delivery. If such notice is not given, neither this company nor any of the connecting or intermediate carriers shall be liable."

The place of delivery was, as the proof shows and the court found, on the piers in New York city. "They were put in

Mr. Miller's section on the pier. \* \* \* That section of Mr. Miller's being virtually his own store or warehouse" (Testimony of Malcom Townsend, R., p. 125).

Counsel for defendant in error, in the first paragraph of his "Brief and Argument," page 42, states:

"The Supreme Court of Arkansas erred in upholding the following provision in the bill of lading, to wit: (copying the above provision)."

It is the contention of plaintiff in error that they did not uphold the provision of the bill of lading with reference to the five cars for which judgment was affirmed, as the court found that the provision had not been complied with, but further held that a compliance with its provisions was not indispensable and that it was unnecessary if the dock foreman knew that the peaches were damaged.

Counsel for defendant in error, on page 43 of their brief, states:

"The undisputed testimony in this case shows that the dock foreman on pier 29 is the agent of the delivering carrier, in charge of the pier and dock."

The Supreme Court in its opinion quotes the testimony of Adam Miller, the consignee, on this point, as follows:

"I called the attention of the dock foreman to the bad peaches and told him they were not iced and had gone bad. I do not know the dock foreman's name. He is in the employ of the Pennsylvania Railroad, which owns the dock where the peaches were unloaded from the car, which was lightered from Jersey City to New York. I don't know his name. He looked at them and went away" (R., p. 149).

The testimony of Mr. Townsend is to the effect that he was not the agent in any sense of the word. Mr. Townsend was the agent. There could be no controversy on this point, and nothing in the entire record shows that he ever had any knowledge of the peaches being damaged, but, if he did, we

submit that there is a wide distinction between knowledge of damage and the provision in the bill of lading that requires, "Claims for damages must be reported by consignee." This distinction was recognized by the Supreme Court of Arkansas in the case of *St. L. & S. F. R. R. Co. vs. Keller*, 90 Ark., 308, in which the court held:

"The contract of shipment in this case specifically provided that before a recovery could be had a notice in writing must be given of loss or damage, within thirty hours after the arrival of the peaches at destination and their delivery; *that is to say, a notice of the intention to claim damages must be so given.*" (Italics ours.)

Also in the case of *Western Union Telegraph Company vs. Moxley*, 80 Ark., 561-2, in which the court says:

"A mere notice to the effect that its employees have been negligent, with the circumstances thereof, is a very different thing from a presentment of a claim for damages based on such negligence, and to hold that a stipulation which requires a presentment of the claim for damages in writing is satisfied by a notice of negligence on which the claim is based would do violence to the language used and be in effect making a different contract between these parties."

Counsel for defendant in error insists that "the stipulation in the bill of lading is against and in violation of the act of Congress and should have been so held by the court."

This contention has been fully answered by the recent decisions of this court. *M., K. & T. Ry. Co. vs. Harriman*, 227 U. S., 657; *K. C. S. Ry. Co. vs. Karl*, 227 U. S., 639; *Adams Express Company vs. Kroniger*, 226 U. S., 491; *C., N. O. & T. P. Ry. Co. vs. Rankin*, 241 U. S., 319; *Northern Pacific Railway Co. vs. Wall*, 241 U. S., 87; *G., F. & A. Ry. Co. vs. Blish Milling Company*, 241 U. S., 190.

Mr. Justice Hughes, in delivering the opinion of this court in the *Blish Milling Company* case, states:



"It may be urged that the carrier is bound to know it has delivered to the right person or according to instructions. The argument, however, even with respect to the particular carrier which makes a misdelivery loses sight of the practical object in view. In fact, the transactions of a railroad company are multitudinous and are carried on through numerous employees of various grades. Ordinarily the managing officers and those responsible for the settlement and contest of claims would be without actual knowledge of the facts of a particular transaction. The purpose of the stipulation is not to escape liability, but to facilitate prompt investigation, and to this end it is a precaution of obvious wisdom and in no respect repugnant to public policy that the carrier by its contracts should require reasonable notice of all claims against it, even with respect to its own operations, but the parties could not waive the terms of the contract under which shipment was made pursuant to the Federal act, nor could the carrier by its conduct give the shipper the right to ignore these terms which are applicable to their conduct and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations."

We submit that the action of the Supreme Court in holding and deciding that mere knowledge on the part of the dock foreman that the peaches arrived in a damaged condition was sufficient of itself for the consignee not to comply with the provision requiring notice of claims for damages is irreconcilably in conflict with the opinion of this court.

In conclusion, on the question of the construction to be placed upon this provision of the bill of lading, we desire to call the court's attention again to the fact that the Supreme Court of Arkansas has found that the provision is reasonable and valid, but in effect they refuse to hold that a compliance with its provisions is necessary to entitle plaintiff to recover; that it may be dispensed with if the delivering carrier, or its employees, has knowledge of the damaged condition in which

the shipment arrived at place of delivery, or it may be waived.

We do not deem it necessary and have not abstracted the evidence upon this point of the reasonableness of the provision, as it is our understanding that the findings of fact by the lower court are binding upon this court. *Smith vs. Gale*, 144 U. S., 509; *Jessup vs. United States*, 106 U. S., 147; *Hathaway vs. First National Bank*, 134 U. S., 494. And under the many recent decisions of this court the carrier cannot waive the provisions in its contracts of shipment.

### Assignment of Error No. 3.

The attention of the Supreme Court, as well as the lower court, was specifically directed to the defense interposed by the defendant in the lower court that the claim upon which this suit was based was barred by the limitation prescribed in section 16 of the act of Congress, which provides that all complaints to recover damages shall be filed within two years from the time the cause of action accrued. This suit was not instituted until July, 1910. In the case of *A. J. Phillips vs. Grand Trunk Western Railway Company*, 59 U. S., Law. Ed., page 444, this court held:

"Under such a statute the lapse of time not only bars the remedy but destroys the liability. \* \* \* Whether complaint is filed with the Commission or suit is brought in a court of competent jurisdiction."

We submit in conclusion that the Supreme Court of Arkansas erred in rendering judgment herein and that judgment should be reversed and that the cross writ of error of defendant in error should be dismissed.

Respectfully submitted,

EDWARD J. WHITE,  
THOMAS B. PRYOR,  
*Attorneys for Plaintiff in Error.*

No. [REDACTED]

275

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In the United States Supreme Court

ST. LOUIS IRON MOUNTAIN & SOUTHERN  
RAILWAY COMPANY, PLAINTIFF  
IN ERROR

vs.  
A. SEABIRD, SPECIAL AGENT OF THE  
ESTATE OF ADAM MILLER, DECEASED,  
DEFENDANT IN ERROR

---

Supplemental Brief on Response to  
Motion to Dismiss in Affirm

EDNA J. WHITE

THOS. B. FRYOR

Attorneys at Law in Charge

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No. 694.

In the United States Supreme Court

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ST. LOUIS, IRON MOUNTAIN & SOUTHERN  
RAILWAY COMPANY, PLAINTIFF  
IN ERROR,

vs.

C. A. STARBIRD, SPECIAL ADMR. OF THE  
ESTATE OF ADAM MILLER, DECEASED,  
DEFENDANT IN ERROR.

---

**Supplemental Brief on Response to  
Motion to Dismiss or Affirm**

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We desire to call the court's attention to a few of the decisions of this court which were rendered subsequent to the time of the preparation of the brief on behalf of plaintiff in error on response to the motion of defendant in error to dismiss or affirm this case.

Mr. Justice McReynolds, in delivering the opinion of this court in the case of Cincinnati, New

Orleans & Texas Pacific Railway Co. vs. D. F. and  
T. C. Rankin, decided May 22nd, 1916, states:

“We cannot assent to the theory apparently adopted below that the interpretation and effect of a bill of lading issued by a railroad in connection with an interstate shipment present no Federal question unless there is affirmative proof showing actual compliance with the Interstate Commerce Act. It cannot be assumed merely because the contrary has not been established by proof, that an interstate carrier is conducting its affairs in violation of the law. Such a carrier must comply with strict requirements of the Federal statutes or become subject to heavy penalties, and in respect of transaction in the ordinary course of business, it is entitled to the presumption of right conduct. The law ‘presumes that every man in his private and official character, does his duty until the contrary is proved,’ it will presume that all things are rightly done, unless the circumstances of the case overturn this presumption, according to the maxim *omnia presumuntur rite et solemniter esse acta, donec probetur in contrarium.*” (Citing authorities).

Mr. Justice Van Devanter, in delivering the opinion of the court in the case of Northern P. Co. vs. Wall (decided April 24th, 1916) states:

“As this court often has held, the law in force at the time and place of the ma-

ing of a contract, and which affects its validity, performance and enforcement, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. *Von Hoffman vs. Quincy*, 4 Wall. 535, 550, 18 L. ed. 408, 409; *Walker vs. Whitehead*, 16 Wall. 314, 317, 21 L. ed. 357, 358; *Edwards vs. Kearzey*, 96 U. S. 595, 601, 24 L. ed. 793, 796. A bill of lading is a contract and within this rule. The Carmack Amendment to the Interstate Commerce Act (§7, Chap. 3591, 34 Stat, 1913, §§ 8863, 8592), which was in force when this bill of lading was issued, directs a carrier receiving property for interstate transportation to issue a through bill of lading therefor, although the place of destination is on the line of another carrier; subjects the receiving carrier to liability for any injury to the property caused by it or any other carrier in the course of the transportation, and requires a connecting carrier on whose line the property is injured to reimburse the receiving carrier where the latter is made to pay for such injury. Thus, under the operation of the amendment, the connecting carrier becomes the agent of the receiving carrier for the purpose of completing the transportation and delivering the property. *Atlantic Coast Line R. Co. vs. Riverside Mills*, 219 U. S. 186, 196, 206, 55 L. ed. 167, 178, 182, 31 L. R. A. (N. S.), 7, 31, Sup. Ct. Rep. 164; *Galveston, H. & S. A. R. Co. vs. Wallace*, 223 U. S. 481, 491,

56 L. ed. 516, 523, 32 Sup. Ct. Rep. 203. This bill of lading was issued under the statute and should be interpreted in the light of it. *Cleveland, C. C. & St. L. R. Co. vs. Dettleback*, 239 U. S. 588, 593, Ante 177, 36 Sup Ct. Rep. 177. The shipper was to pass over both roads in reaching its destination; the delivery at that place was to be made, as in fact it was, by an officer or station agent of the connecting carrier; and the stipulated notice was to be given before the cattle were removed from the place of destination or mingled with other stock; that is, while it was yet possible from an inspection of them to ascertain whether the claim of injury, if any, was well founded. In these circumstances it seems plain that the stipulation meant and contemplated that the notice might be given at the place of destination to an officer or station agent of the connecting carrier, and that notice to it, in view of its relation to the initial carrier should operate as notice to the latter. This interpretation treats the stipulation as designed to be fair to both shipper and carrier, permits it to serve a useful purpose, and gives due effect to the statute under which it was issued. True, the words 'Said Company' in the stipulation, if read only in connection with an introductory sentence in the bill of lading, would seem to refer to the initial carrier alone, but when they are read in connection with the statute and other parts of the bill of lading, including



the provision that its terms and conditions 'Shall inure to the benefit of' any connecting carrier, it is apparent that they embrace the carrier making the delivery as well as the initial carrier, especially as the former is, in legal contemplation, the agent of the latter.

"The Act of March 4th, 1915, Chap. 176, 38 Stat. at L. 1196, altering the terms of the Carmack amendment, is without present bearing, because passed long after this shipment made."

This latter case is directly in point on the question involved in the case at bar; in that case the contract contained a similar provision to the provision in the bill of lading covering the shipment in this case; to quote from the opinion of this court, "One stipulation was to the effect that the shipper, as a condition precedent to his right to recover for any injury to the cattle while in transit, should give notice in writing of his claim to some officer or station agent 'of said company' before the cattle were removed from the place of destination and mingled with other stock." The provision in the bill of lading in the case at bar provides, "Claims for damages must be reported by the consignee in writing to the delivering line within forty-six hours after the consignee has been notified of the arrival of the freight at the place of

delivery, and if such notice is not there given, whether this company nor any of the connecting or intermediate carriers shall be liable." This court, passing upon the interpretation to be given to the provision of the contract in that case states:

"The Supreme Court, passing the question whether notice had been waived, interpreted the stipulation as requiring that the notice be given to an officer or station agent primarily employed by the Northern Pacific Company, and thereby excluding notice to an officer or station agent of the Burlington Company, and the court held the stipulation unreasonable and inoperative, because no officer or agent primarily employed by the Northern Pacific Company, was accessible at the place of destination. Whether in so interpreting the stipulation that court gave proper effect to the interstate commerce act and its amendments is the Federal question now pressed upon our attention, and we think it is fairly presented by the record. The shipment being interstate, that legislation was controlling; the through bill of lading was issued under it; the pleadings show that its application was invoked; and the answer, as also in the instruction given at the defendant's request, there was a distinct assertion that notice was not given 'To any officer or station agent of the defendant, or to any officer or station agent of the connecting carrier,' which meant that

the defendant was proceeding upon the theory that the stipulation, when read in connection with the Carmack amendment, connecting carrier,' which meant that the defendant was proceeding upon the theory that the stipulation, when read in connection with the Carmack amendment, contemplated and recognized that notice to an officer or agent of the connecting carrier—the Burlington Company—would suffice."

Mr. Justice Hughes in delivering the opinion of that court in the case of Georgia F. & A. R. Co. vs. Blish Milling Company, states:

"These decisions also established that the question as to the proper construction of the bill of lading is a Federal question. The clause with respect to the notice of claims—upon which plaintiff in error relies in its second contention—specifically covers 'failure to make delivery.' It is said that this is not to be deemed to include a case where there was not only failure to deliver to the consignee, but actual delivery to another, or delivery in violation of instructions. But 'delivery' must mean delivery as required by the contract, and the terms of the stipulation are comprehensive—fully adequate in their literal and natural meaning to cover all cases where the delivery has not been made as required. When the goods have been misdelivered there is as clearly a 'failure to make delivery' as when the goods have

been lost or destroyed; and it is quite competent in the one case as in the other for the parties to agree upon reasonable notice of the claim as a condition of liability. It may be urged that the carrier is bound to know whether it has delivered to the right person or according to instructions. The argument, however, even with respect to the particular carrier which makes a misdelivery, loses sight of the practical object in view. In fact, the transactions of a railroad company are multitudinous, and are carried on through numerous employees of various grades. Ordinarily the managing officers, and those responsible for the settlement and contest of claims, would be without actual knowledge of the facts of a particular transaction. The purpose of the stipulation is not to escape liability, but to facilitate prompt investigation. And, to this end, it is a precaution of obvious wisdom and in no respect repugnant to public policy, that the carrier by its contracts should require reasonable notice of all claims against it even with respect to its own operations. \* \* \*

But the parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal Act; nor could the carrier by its conduct give the shipper the right to ignore these terms which are applicable to that conduct, and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations.

A different view would antagonize the plain policy of the act and open the door to the very abuses at which the act was aimed. *Chicago & A. R. Co. vs. Kirby*, 225 U. S. 155, 166, 56 L. ed. 1033, 1038, 32 Sup. Ct. Rep. 648, Ann. Cas. 1914A, 501; *Kansas City Southern R. Co. vs. Carl*, supra; *Atchison, T. & S. F. R. Co. vs. Robinson*, 233 U. S. 173, 181, 58 L. ed. 901, 905, 34 Sup. Ct. Rep. 556; *Southern R. Co. vs. Prescott*, supra. We are not concerned in the present case with any question save as to the applicability of the provision, and its validity, and as we find it to be both applicable and valid, effect must be given to it."

No contention has ever been made by the plain-  
(or defendant in error) that a written notice,  
any notice whatever was at any time given of  
claim for damages on account of the damaged  
condition of the peaches upon arrival in New York  
and delivery to the consignee; to the contrary, the  
consignee admits that no notice was served upon  
the delivering line as provided in the bill of lading,  
and the Supreme Court of Arkansas states in its  
opinion that no notice was given, and yet, the  
judgment was affirmed as to the five cars against  
the defendant in error merely because the Dock  
Commissioner's attention was called to the damaged con-  
dition of the peaches and that he had an oppor-  
tunity to investigate their condition.

The only evidence as to the authority of the Dock Foreman is found in the deposition of Maccom Townsend, agent for the Pennsylvania Line New York City, in which he states: "The Dock Foreman was not the agent of the Pennsylvania Railroad in any sense of the word." (Record, 125.) However, we do not deem it necessary to make the motion pending to advance and affirm to make an abstract of the evidence as no abstract of the evidence has been made by the defendant in error.

We respectfully submit that under the decision of this court there is a Federal question involved in this case and the motion of the defendant in error to dismiss the appeal should be denied.

Respectfully submitted,

EDW. J. WHITE,

THOS. B. PRYOR,

Attorneys for Plaintiff in Error





NO. 100

1910

# Supreme Court of the United States

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ST. LOUIS, MO. MONDAY, JAN. 10, 1910

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No. 275

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1916

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Error to the Supreme Court of the State of Arkansas.

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ST. LOUIS, IRON MOUNTAIN & SOUTHERN  
RAILWAY COMPANY,

Plaintiff in Error,

vs.

C. A. STARBIRD, SPECIAL ADMINISTRATOR OF  
THE ESTATE OF ADAM MILLER, DECEASED,

Defendant in Error.

---

*BRIEF OF DEFENDANT IN ERROR.*

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STATEMENT OF THE CASE.

A suit for ten cars of Elberta peaches, which were damaged by delay in failing to ice was instituted by Adam Miller against the St. Louis, Iron Mountain & Southern Railway Company on the 7th day of April,

1908, in the Greenwood district of Sebastian County and on the 6th day of July( 1908, was removed from said court to the United States Court for the Western District of Arkansas, where the suit remained until the 7th day of July 1910, at which time a non-suit was taken as was shown by the certificate of William S. Welsher to the following order of the court, to-wit:

“On Thursday, July 7, 1910, among the proceedings had were the following to-wit:

Adam Miller, Plaintiff, No. 300 Law, vs. St. Louis, Iron Mountain & Southern Railway Company, Defendant.

This day comes the plaintiff by Robert A. Rowe, his attorney, and by leave of court enters a voluntary non-suit herein without prejudice. It is thereupon by the court considered, ordered and adjudged that this cause be dismissed without prejudice, and that the defendant do have and recover of and from said plaintiff all cost by the said defendant in this behalf laid out and expended.”

“I, Wm. S. Wellshear, clerk of the District Court of the United States for the Western District of Arkansas, certify the foregoing to be a true and correct copy of an order of the Circuit Court of the United States for the Western District of Arkansas in case of Adam Miller vs. St. Louis, Iron Mountain & Southern Railway Company, No. 300 Law, as the same ap-

pears of record in my said office in the Ft. Smith division of said district.

In testimony whereof, I hereunto set my hand and affix the seal of said court at office in the city of Fort Smith, Arkansas, this April 7, 1915.

WILLIAM S. WELLSHEAR, Clerk."

A suit for each one of the ten cars was afterwards brought in the Crawford Circuit Court on the 18th of July, 1910.

The above dates appear of record at Greenwood in the Circuit Court for the Greenwood district and the United States Court at Ft. Smith.

That the cases after being continued from time to time upon request of the plaintiff in error, or by consent until the 9th day of February, 1914, a jury having been waived at the November term of the Crawford Circuit Court by counsel on both sides all ten cases were consolidated and tried together as one case.

It is alleged in the complaint that appellant was operating a line of railway from Greenwood, Ark., to St. Louis, Mo., that Adam Miller, plaintiff, by and through his agent L. A. Taylor, made a contract of purchase in July from the plaintiffs in the action and to pay therefor the sum of \$1.25 per crate on board the cars at Greenwood, but on account of the negligence of the defendant to take care of said peaches in transit by iceing the cars, and acts of negligence, the peaches



arrived in the city of New York in such rotten and damaged condition and on account of such damaged condition of the peaches hereinafter named, it was proposed by Adam Miller, one of the plaintiffs herein that he would pay sixty-five cents per crate to Robert A. Rowe as agent and attorney for the plaintiffs who were the owners of the fruit in the following named cars, to-wit:

A. R. T. Nos. 8787, 9737, 10640, 9089, (10756), 8683, 10875, 9478, 8711, 10542 and 10052, and institute suit against the defendant company and in consideration of plaintiffs accepting said sum on the peaches in the condition they were in Adam Miller would give and divide with the other plaintiffs in this case one-half the damages recovered and the plaintiff Adam Miller, one-half; that the plaintiffs delivered to the defendant company at its station in Greenwood, Ark., and that said defendant accepted for shipment four hundred and ninety-six basket crates of peaches in sound, firm and good shipping, salable condition which the defendant at the time undertook and agreed to load properly in its car, refrigerate it sufficiently to prevent the peaches therein from decaying, to handle with care, and made a way bill in which the railroad company agreed to transport the same from Greenwood, Ark., to the city of New York without delay and deliver the same in a merchantable condition to Adam Miller in consideration of which the plaintiff, Adam Miller undertook to pay the railroad company the ordinary

and reasonable charges, a copy of the way bill can not be attached hereto for the reason that it is in possession of the defendant company. That after the defendant loaded the peaches in its refrigerator cars and after they were shipped they appeared in the way bill from L. A. Taylor, Greenwood, Ark., to Adam Miller, New York.

In the ordinary course of transit from Greenwood, Ark., to the city of New York said cars of peaches should and would have arrived in the city of New York the fifth morning after shipment from Greenwood, in a sound and merchantable condition, and were worth on the market in New York City \$2.25 per crate or the total sum of \$1102.50, but by reason of the defendants' negligence and carelessness in handling, moving and caring for said peaches as set forth in the complaint they became too hot and thereby wilted, shrunk, moulded, bruised and decayed so that they did not and would not bring the price of sound peaches on the market of said city, but on the market in said city were reasonably worth and sold for only the sum mentioned in each one of the complaints of ----- dollars.

The acts of negligence and carelessness on the part of defendant company as alleged in the complaint consisted in this, to-wit:

1. That plaintiff in error failed, refused and neglected to put in a sufficient amount of ice before the

car was sent to and before it left Greenwood, neglected to keep ice in the car sufficient to preserve the peaches until they reached their destination; neglected to move said cars from Greenwood, Ark., for more than twenty-four hours after said peaches were loaded and ready for shipment.

2. That the plaintiff in error neglected to load the peaches for shipment and allowed them to remain on the platform at Greenwood, Ark., for more than twenty-four hours after peaches had been delivered and accepted by it for shipment.

3. That the plaintiff in error delayed the cars of peaches while in transit between Greenwood, Ark., and New York City for more than eight days, by reason of which plaintiff was damaged in the sum of ----- dollars, mentioned in each complaint.

4. That plaintiff in error negligently and carelessly loaded the peaches into a broken, defective and unsuitable cars in this: that the doors of the cars were swollen and warped to such an extent that the same could not be closed nor fastened, that the bunkers were too small to hold a sufficient amount of ice to keep the peaches cool enough to preserve them and the space above the peaches when loaded was too small to contain a sufficient amount of cold air to preserve them.

5. The plaintiff in error negligently handled said cars so that the peaches became bruised and mashed.

6. Plaintiffs paid the freight.

What purports to be a copy of the bill of lading was made exhibit "A," but plaintiff does not know whether any portion of it is a copy except what is filled in with pencil. It was attached under order of the court.

Without further consideration passing and without special rate the plaintiff in error issued and delivered a bill of lading to L. A. Taylor, agent of Adam Miller.

The plaintiff in error used no other form of receipt or bill of lading and would not have given Adam Miller any other or a different form which was well-known to consignor and consignee, and Adam Miller paid full rates on the shipments. The bill of lading contained the follow stipulation, to-wit: "Claims for damages must be reported by consignee in writing, to the delivering line within thirty-six hours after the consignee has been notified of the arrival of the freight at the place of delivery. If such notice is not there given, neither this company nor any of the connecting or intermediate carriers shall be liable."

This clause was inserted therein without the consent of the plaintiff who did not see the bill of lading until several days after it was issued, as the plaintiff Adam Miller was in New York at the time. That this provision was unreasonable in this, to-wit: That the consignee resided in New York City and did not know

at the time he learned of the damaged condition of the peaches whether it was the fault of the shipper or of plaintiff in error so as to know from whom to claim damages and could not ascertain whose fault it was within thirty-six hours, or ascertain the damage and report the same as the owners of the fruit resided at Greenwood, Ark., at the time the fruit was shipped and the time it arrived in New York City; that it was more than thirty-six hours before the fruit in said cars could be examined by Adam Miller in the regular course of business and the amount of the loss discovered and reported; the cars of peaches were delivered by the Pennsylvania Railway Company whose terminus is at Jersey City, N. J., where its depot and railroad buildings are located, from which place the cars were run into the barges of said railway and towed over the Hudson river to pier 29 in the early part of the night and no one is permitted on the cars, barges or dock except the employes of the railway company; that the cars were unloaded while on the barges by the employees of the Pennsylvania Railroad Company, the delivering carrier, who inspected and examined every car of peaches and knew of their own personal knowledge the rotten and damaged condition in which they arrived at destination. The top and sides of the crates were open being made of small slats so that the peaches could be plainly seen in crates without being opened, by the agents and employees of said company as they unloaded them and placed them on

the dock; that said agents of the company saw and knew of the rotten condition of the peaches; that the dock-master whose name is unknown to plaintiffs was given notice by Adam Miller, and in addition to this, had actual knowledge of the damaged condition of the peaches. Adam Miller noticing that the peaches were rotten went to see the dock foreman, the agent of the Pennsylvania Railroad Company, and requested him to look at and examine the condition of the peaches which he did, which was within thirty-six hours after their arrival. That there is no agent of the delivering carrier designated in the bill of lading on whom notice of the claim of damage could be served; that he is the only agent that Adam Miller knew about and was the agent of the company placed in charge of pier 29. The plaintiff in error knew the peaches would rot in transit if they were not iced, as they are perishable and were in the control of the company and it was unnecessary for notice to be given them of a fact they already knew.

The plaintiff in error knew when said cars of peaches were loaded at Greenwood, Ark., they were not iced sufficient to protect them from decay. The plaintiff in error knew at the initial point as well as the point of delivery they would rot unless they were iced and kept iced. (Complaint R. p. 1-6.) Judgment was rendered for the defendant in error on the 11th day of February, 1914, by the court sitting as a jury on the ten cars embraced in this suit for the sum of \$8,670.34

which includes 6 per cent interest from August 10, 1907, until paid. All ten complaints are the same.

After non-suit July 7, 1910, suits were filed on July 18, 1910, in the Crawford Circuit Court. (R. 6.)

Answer (R. p. 6-11.)

Amounts claimed in the other nine complaints. (R. 11.)

Material part of the other nine bills of lading. (R. 12-16.)

The plaintiff in error contracted with the Fruit Growers' Association in the spring of 1907, before the shipping season commenced in July to ship the Elberta peach crop of 1907, estimated at from \$75 to \$100.

These peaches were packed by expert packers from Georgia and Florida. R. C. Cumbie was shipping agent for the Greenwood Fruit Growers' Association for 1907. The delivering carrier had an inspector at Pier 29, New York, who inspected and examined every car of these peaches, and saw and knew they were rotten. The company placed a notice on the depot, at Greenwood, Ark., which admitted they had no ice with which to ice these cars. The schedule and time agreed to deliver these peaches from Greenwood, Ark., to pier 29, New York, was five days, but it failed, and the peaches were in transit to Jersey City, N. J. from nine to seventeen days, making from four to twelve days on the road more than the agreed time. The peaches



arrived damaged from 50 to 80 per cent rotten and the juice running out of from one-third to one-half of the crates in every car, which the Long-Shoreman, the inspector of the delivering carrier and the dock foreman of pier 29, saw and had personal knowledge.

### PLAINTIFFS' EVIDENCE.

Depositions of Adam Miller on each of the ten cars, he testified in substance: I am a commission merchant in New York at 328 Washington street, for the last fifteen years. Car 8787 arrived in Jersey City, August 1, 1907, contents, 490 crates peaches, sold for \$539, which was the highest market price in the condition in which they arrived. The market value of Elberta peaches, when sound was \$2.25 per crate in New York. I saw these peaches immediately after they were unloaded from car and more than one-half of the peaches were unmarketable, specked, mashed and mouldy. Some of them were entirely rotten. When taken from the car the peaches were leaking in more than a third of the crates. Fully fifty per cent were absolutely unmarketable and the rest of the peaches when they came out of the car were warm and dry. I did not go into the car, Pennsylvania Railroad Company delivered the car to the Merchants Refrigerating Company's warehouse in Jersey City, the crates of peaches were taken off of the car by the railroad company's employees, and put into the refrigerator as fast as they came off the cars. I went over at once and

had the peaches sorted and the rotten ones thrown out and the sound ones repacked in crates and the crates of sound peaches were then put into the cars. When the peaches were put into the refrigerators they were warm and dry. I paid the freight on this car the amount was \$291.70. The condition of the peaches was not uniform through the car. The top layers were about eighty per cent rotten and worthless. The third layer was about sixty per cent wholly bad, the lower layers run much better. The top three layers were the worst. This car was shipped on the evening of July 23, 1907. It was due to arrive in New York four and a half days after that, which would make it the morning of July 28, 1907. The Merchants' Refrigerating Company has a switch running to its doors. The cars run from there to the river where they are run on board a lighter. It is the Hudson river, about a mile wide. The peaches were unloaded by the railroad company's employees at the Merchants' Refrigerating Company's plant. The car arrived at the end of the road in Jersey City. It was then unloaded by the railroad company's employees and the peaches taken into the Merchants' Refrigerating Company. I was then notified of its arrival and went over to the Merchants' Refrigerating Company. I put a lot of men at work sorting the peaches, throwing out the rotten and unmarketable ones and repacking the sound ones in crates. Several cars arrived at the same time. It would take from two to four days to get the sound peaches separated

and recrated and then it would take another day. (R. 21-24.) This car was in transit nine days, four days over scheduled and contracted time.

Deposition of Adam Miller on car 9737. This car was shipped on the evening of July 21, 1907. It was due to arrive in New York four and a half days after; that would make it the morning of the 26th of July, 1907. This car arrived in Jersey City on August 7, 1907. The condition of the peaches were not uniform throughout the car. The two top layers were about eighty per cent rotten and worthless. The third layer was about sixty per cent wholly bad. The lower layers run much better. The damage was sixty per cent. The remainder of the deposition on this car is the same as on the preceding car, therefore we deem it unnecessary to mention the other testimony on this car. (R. 24-27.) This car was on the road seventeen days, twelve days longer than the agreed time.

The lower court found against the defendants in error on these two cars.

Deposition of Adam Miller on car 10640:

"This car was shipped on the evening of July 20, 1907. It was due to arrive in New York four and a half days after that; that would make it the morning of July 25, 1907." This car arrived in Jersey City on July 31.

Ans. Int. No. 17: "I called the attention of the

dock foreman to the bad peaches and told him they were not iced and had gone bad. I don't know the dock foreman's name. He is in the employ of the Pennsylvania Railroad, which owns the dock where the peaches were unloaded from the car which was lightered from Jersey City to New York. I don't know his name. He looked at them and went away."

Ans. Int. No. 18: "The railroad company has a man at the dock who inspects the peaches as they come on the dock off of the cars and sees the condition which they arrive in."

Ans. Int. No. 19: "The cars arrived at Jersey City by rail from Arkansas. At Jersey City they run the cars on to a lighter and they are towed to pier 29, North river, New York, which is at the foot of North Moore street, where they are unloaded. This dock is five city blocks from my place of business, that means about a quarter of a mile. They are towed across the Hudson river which is about a mile wide. The peaches are unloaded from the cars by employees of the railroad and are placed on the dock at pier 29. I have nothing to do with this unloading and they do not let me go through to see it done. It is all done by the railroad company."

In. No. 20. "State whether or not you know that thirty-six hours after notice of the arrival of said car is a reasonable or unreasonable provision length of time to give notice to the delivering carrier of a claim

of damages, giving all the circumstances and the manner of unloading and marketing Elberta peaches at that end of the line?"

Ans. Int. No. 20: "The cars arrive at the railroad terminal in Jersey City. After they arrive they are switched from the road to a lighter ten or twelve cars being run on the lighter, and they tow this lighter across the river to pier 29 and they get to pier 29 sometime in the evening when they tie the lighters up to the dock. It is an entirely closed dock. At six o'clock in the evening the doors of the dock are closed up and no one except the employees of the railroad are allowed to go in. Everybody else is put out of the dock. The door is then locked and no one else can get in. At midnight they put a bulletin up showing the car numbers and the dealers to whom the fruit is sent. At one o'clock in the morning the dock doors are open and the dealers go in and find their peaches. Between six in the afternoon and one o'clock in the morning the dealers are not allowed to go where the peaches are being unloaded nor on the lighter nor in the cars. They do not know the cars have come until twelve o'clock when the bulletin goes up. The unloading from the cars is done by the railroad employees themselves and no one else is present and you can't be present if you try. At one o'clock the doors are open, the empty cars have generally gone back to Jersey City and there aint no chance of even seeing them or the lighter even from the dock. When the peaches are all sound they are sold at the

dock and most always gotten rid of before noon of that day. If a lot of them are bad, the same as this car was they have to be sorted out and the good ones picked out from the bad ones and a lot of them hauled to my place of business because they do not allow you to sort them or pack them at the dock, and if they aint sold on that day they are sorted over to my place of business and the sound peaches are repacked into crates and the bad peaches are thrown away and that takes a lot of time, picking the sound peaches out of two, three or four crates to make one crate of good peaches. I had to get trucks to take them to my store and then had to get extra men to do the sorting and repacking so that they could be sold on the next day. So that I couldn't tell within two or three days and until my bookkeeper had figured up what was going to be lost on each car, what the amount of the damage was, and in some cases it would be three or four days or five days after the car arrived before I would know; and some crates of peaches which looked sound I would sell as sound and then afterwards the purchaser would telephone to me and I would have to go up and look at the peaches and I would then find that there were a lot of them bad and I would have to make an allowance off of the price because I sold them as sound peaches. I wouldn't know this until the next day and then it would take a lot of time to look them over and agree upon the allowance. I couldn't know in thirty-six hours how much damage was done because in a lot of peaches it would take more

than this time to sort them out and repack them, to say nothing of getting them sold and delivered and figuring up the balance."

Ans. Int. No. 10: "I did not go into the car. I saw them as soon as they were unloaded. Fully seventy per cent of the peaches were unmarketable, rotten-specked, mashed, bruised and mouldy. When they were put on the dock they were leaking in more than half of the crates. The sound peaches were warm and dry. The peaches in that car were warm and dry."

Ans. Int. No. 11: "I did not go into the car, the Pennsylvania Railroad, which owns the dock, do not permit me to go either on board the lighter or into the car. I did not see the car doors, nor drain pipes nor the ice bunkers. When the peaches came out of the car they were warm and dry except the wetness from leakage."

Ans. Int. No. 14: "The condition of the peaches was not uniform through the car. The two top layers were about eighty per cent rotten and worthless, the third layer was about sixty per cent wholly bad. The lower layers run much better. The three top layers were the worst. There were a lot of bad peaches scattered all through the car. More than seventy per cent of the peaches arrived in a specked, rotten, bruised and mouldy condition."

Last above is the substance of interrogatory fifteen and answer thereto.



Ans. Int. No. 5: "I received for the peaches in that car, \$367.50. This car contained 490 crates of peaches."

Ans. Int. No. 8: "The market value of Elberta peaches in the New York City market when they were sold was \$2.25 per crate." (R. 27-31.)

This car was in transit eleven days, six days more than the schedule and agreed time.

The court rendered judgment on this car for plaintiffs, \$661.50, and \$257.98 interest.

Deposition of Adam Miller on car 9089 (10756). Car was shipped on the evening of July 21, 1907. It was due to arrive in New York four and half days after that, that would make it the morning of the 26th of July, 1907. Ans. Int. 16.

Ans. Int. 4. Arrived in Jersey City, August 7, 1907.

Ans. Int. 16. "This car was shipped in the evening of July 21, 1907. It was due to arrive in New York four and half days after that; that would make it on the morning of the 26th of July." (R. 31-35.)

This car was in transit seventeen days which was twelve days more than the agreed time.

The Supreme Court reversed the judgment on this car.

Deposition of Adam Miller on car 8683.

The answer to Interrogatory No. 16, shows that the car was shipped on the evening of July 20, 1907, was due to arrive in New York four and half days after that, making it in the morning of July 25, 1907.

Ans. Int. No. 4. Car No. 8683 arrived in New York City, July 30, 1907.

Ans. Int. No. 17: "I called the attention of the dock foreman to the bad peaches and told him they were not iced and had gone bad. I don't know the dock foreman's name. He is in the employ of the Pennsylvania Railroad, which owns the dock where the peaches were unloaded from the car, which was lightered from Jersey City to New York. \* \* \* He looked at them and went away."

Ans. Int. No. 18: "The railroad company has a man at the dock who inspects the peaches as they come on the dock off the cars and sees the condition which they arrive in."

Ans. Int. No. 14: "The condition of the peaches was not uniform through the car, the two top layers were about sixty per cent rotten and worthless, the third layer was about sixty per cent wholly bad, the lower layers run much better, the top three layers were the worst. There were a lot of bad peaches scattered all through the car."

The substance of Interrogatory No. 15 and answer thereto shows that more than seventy per cent of the peaches were specked, rotten, bruised and mouldy.

Ans. Int. No. 10: "I did not go into the car I saw them as they were unloaded, fully seventy per cent of the peaches were unmarketable, rotten, specked, mashed, bruised and mouldy. When they were put on the dock they were leaking in more than half the crates. The sound peaches were warm and dry." \* \* \* (R. 35-39.)

This car was ten days in transit, five days over the schedule and agreed time.

Judgment was affirmed for plaintiff \$661.50, interest, \$257.98.

Deposition of Adam Miller on car 10875.

The answer to Interrogatory No. 16 shows this car was shipped on the evening of July 17, 1907, was due to arrive in New York four and half days after that, which would be July 22, 1907.

Answer to Interrogatory No. 4 shows that car 10875 arrived in New York on July 26, 1907.

Answer to Interrogatory No. 10, shows that sixty five per cent of the peaches were unmarketable, rotten, speckled, mashed, bruised and mouldy. When they were put on the dock they were leaking in more than a third of the crates and warm.

Ans. Int. No. 17: "I called the attention of the dock foreman to the bad peaches and told him they were not iced and had gone bad. \* \* \* He is in the

employ of the Pennsylvania Railroad which owns the dock where the peaches were unloaded. . . . He looked at them and went away."

Ans. Int. No. 18: "The railroad company has a man at the dock who inspects the peaches as they come on the dock off the cars, and sees the condition which they arrive in." (R. 39-43.)

This car was in transit nine days, four days over the schedule and agreed time.

The answer to Interrogatory 20 shows that the stipulation in the bill of lading was unreasonable as Adam Miller could not comply with it within that length of time.

The judgment of the lower court was affirmed on this car for \$637.88, interest \$248.77.

Deposition of Adam Miller on car 9478.

The answer to Interrogatory No. 16 shows that the car was shipped on evening of July 23, 1907, and the answer of interrogatory No. 4 shows it arrived in Jersey City August 7, 1907, making fifteen days in transit, ten days over the schedule and agreed time. (R. 43-46.)

The judgment was reversed as to this car.

The interrogatories and answers thereto are practically the same on this car as on car 8787.

Deposition of Adam Miller on car 8711.

The answer to Interrogatory No. 16 shows the above car was shipped on the evening of July 23, 1907, and the answer to interrogatory No. 4 shows it arrived in Jersey City, August 7, 1907, making fifteen days in transit, ten days over the schedule and agreed time. (R. 46-50.)

The judgment was reversed as to this car.

The interrogatories and answers on this car are practically the same as on car 8787, we therefore deem it unnecessary to set out the testimony any fuller as the court can find testimony herein on car 8787, which appears on pages of the record 21-24, and so with car 9478.

The deposition of Adam Miller on car 10542.

The answer to interrogatory No. 16 shows that the car was shipped on evening of July 19, 1907, and the answer to interrogatory No. 4, shows it arrived in Jersey City July 29, 1907, making ten days in transit to Jersey City, five days over the schedule and agreed time. (See record 50-54.)

The judgment was affirmed as to this car.

The interrogatories and answers on this car are practically the same as on car 10640, which appears on record 27-31, and heretofore partly set out in this brief.

Judgment was affirmed on this car.

The interrogatories and answers on this car are

practically the same as on car 10640, which appears on record 27-31, and heretofore partly set out in this brief. Judgment was affirmed on this car.

Deposition of Adam Miller on car 10052.

The answer of Adam Miller to interrogatory No. 16 shows that this car was shipped on the evening of July 18, 1907, and the answer to interrogatory No. 4 shows it arrived in Jersey City July 29, 1907, making eleven days in transit to Jersey City, six days over the schedule and agreed time. (See record 54-58.)

The interrogatories and answers on this car are practically the same as on the above car; therefore, we deem it unnecessary to set it out any fuller.

The initials of all these cars are A. R. T.

Cross-Interrogatories propounded to Adam Miller by the defendant.

Substance to answer to cross-interrogatory No. 10. L. A. Taylor bought the peaches at Greenwood, Ark., for \$1.25 per bushel. I paid drafts and wired money for eight cars of peaches and with delay in transit they arrived in almost worthless condition. My Mr. Taylor informed me that we were to receive a six-day delivery from Greenwood and Van Buren, Ark., (where we were buying peaches.) The result was that every car was from twelve to twenty days in transit. (R. 59-60.)

The substance of answer to cross-interrogatory No. 12. I issued an order to the Pennsylvania Rail-

road Company to have six cars of peaches transferred to the Merchants' Refrigerating Company in Jersey City, as previous to this the Board of Health condemned from one hundred to two hundred crates of peaches in each and every car that we received in New York City on dock, same being a total loss. Ordering them in Jersey City cold-storage we were in a position to put help on same, repack them, then reload them in cars again and have them brought to New York a day or two later. \* \* \* Should we not have done this with these peaches, there is no doubt, the Board of Health would have condemned them all as they informed me that such would be the case upon arrival of the next cars and I only did this for my protection as well as the railroad company. \* \* \*

Answer in substance to cross-interrogatory No. 13. As to Merchants' Refrigerating Company signing for them in good condition, I do not know whether they did or not. I think they signed for them, "contents unknown," the same as they issue their receipts said to "contain such" as such an article.

Substance to answer to cross-interrogatory No. 14. Said order was given by me and accepted by the Pennsylvania Railroad Company, otherwise, peaches would not have been received by the Merchants' Refrigerating Company, but would have come direct to New York.

Answer to cross-interrogatory No. 15: "Notice



was given to the Pennsylvania Railroad Company in several ways, by them knowing the condition of the fruit upon arrival on the pier, refusing to allow us on float to examine the temperature of cars, and by the passes the Pennsylvania Railroad Company received signed by the Board of Health, condemning crates of peaches in most every car that we were compelled to put back in the cars and dump same."

Cross-interrogatory No. 16: "Please state if you or the Merchants' Refrigerating Company, did not receipt for these cars in good condition?"

Answer to cross-interrogatory No. 16: "I did not, nor do I think the Merchants' Refrigerating Company did." (R. 60-61.)

In cross-interrogatory No. 12. M. Townsend is designated as the agent of the Pennsylvania Railroad Company pier 28, North River, New York City (R. 60.) Nothing is said of pier 29 in this interrogatory.

Deposition of J. T. Young.

Direct-examination.

"I inspected A. R. T. cars Nos. 8787, 10542, 10875, and 10052, which were loaded with only firm, sound peaches, packed by Georgia packers, color of all good sound peaches in good condition." (R. 62.)

Deposition of D. T. Goldsmith of Van Buren, Ark.

"I was connected with Payne, (Who was the sales agent of the peaches from Greenwood), I had been to

the market in 1905, 1906 and 1907 and sold crops of peaches. I went to New York and saw A. R. T. cars from Greenwood, Ark. I went to New York during the peach season of 1907 for the purpose of handling carloads of peaches from this section and report the condition of cars arriving there. I received instructions from J. B. Payne to look after the cars of peaches shipped from Greenwood, Ark. (R. 66-67.)

“A R. T. car 10875 arrived in poor condition. My estimate of the damage was seventy-five per cent. The car was from Greenwood. The following cars were from Greenwood, Ark., handled by Adam Miller, A. R. T. cars Nos. 10052, fifty per cent damage; 10542, fifty per cent damage in my estimation, 8787, was about sixty to seventy-five per cent damage to the best of my knowledge of it; 10640, this car was so badly damaged that it was not allowed to be sold on the dock. The damage to this car must have been fully eighty per cent damage. That is all the cars I have that I saw on the dock. Four more A. R. T. cars that was placed in cold storage and I examined them over there, but didn't see them sell or repack. That is as far as I could go, what I saw with my own eyes sold on the dock. (R. 67.)

“The cars I saw in the cold storage are 8711, my judgment is seventy-five per cent damage on that car as I saw it in the cold storage room, 9478 I considered entirely worthless and 8787; those two cars are the ones that are both the same way.

"10541 may be 10542, I couldn't say. It was from Greenwood, I looked at the stencils of some of your growers' names on the crates, with Greenwood stenciled on them, so they must have been from Greenwood, all of them. Now six of the A. R. T. cars I have got; I saw in cold storage those four cars. Those two cars I made my little notation on I considered not worth re-packing. They ought to go to the dump. I would put the damage on those two cars at seventy-five per cent what I saw. The temperature of the cold storage was splendid; it was very cold, sufficiently cold for any cold storage purpose. When the examination was made in the cold storage, Adam Miller, Mr. Rowe and myself were the only three in the party. Adam Miller had hands in there sorting, re-packing the peaches. (R. 68.) I can't state how many, two or three or four or five, didn't pay much attention to them. I think Adam Miller was a good hustler and seemed to have a great many friends and I think he did as much towards getting the price as any other commission houses I became acquainted with. Adam Miller was ordered off the dock with car 10640. I saw it on the dock before he took it to the storage to re-pack.

Q. State if you know who ordered them off the dock?

A. The inspector sent them off. Rotten stuff isn't allowed to be sold on the piers, there is an inspector at every pier.

Q. I will ask you if the dock master of the railroad company don't see the fruit when it is put out?

A. Yes sir, he has to inspect every car is my understanding of it.

"If Adam Miller received that much he done splendidly." This answer is in response to a question that embraces all the amounts that Adam Miller received for each of the ten cars.

"I was ordered off the dock after I had sold something like 200 crates and had to repack them. Sometimes I would get one crate out of three and sometimes out of two, but it took on an average three crates to make one good one, especially the car I was ordered to take off the dock. In spite of the inspector when they were specked and damaged if they were not too rotten he allowed them sold." (R. 72.)

Cross-examination. (R. 73-79.)

D. T. Goldsmith deposition.

Q. I will ask you the question this way. You may state what you know about what their dock master knew about their rotten condition on their arrival?

A. The railroad company placed the cars at the dock there, and they were unloaded by the long shoremen, and I suppose they are in the employ of the Pennsylvania Railway Co., and it would be impossible for them to unload peaches, in the condition that those

peaches were, without knowing them to have been damaged for the juice leaked out all over them when they unloaded them. Most all the cars I saw personally were leaking badly. (R. 82-83.)

"My understanding the pier belonged to the railroad company. The peaches were unloaded sometimes between 4:00 p. m. and 12:00 midnight by the long shoremen."

Q. State what you know about the dock master on pier 29 knowing about the condition of the peaches in those cars mentioned in your direct examination?

A. The dock master stacks each car by itself, and the car from which the stack is taken is placed on a board and tacked on to the stack. Sometimes their names is just written on the car numbers. That is, the car number and Adam Miller, that is all there is on it. Sometimes their names is not on it and they have to find it by just the number.

Q. Then the dock master saw and knew that these peaches were rotten?

A. Couldn't help it. (R. 83.)

Deposition of J. A. Barrett, of Van Buren, Ark.

"I have handled fruit for eighteen or twenty years to the different large towns throughout the United States, and am familiar with the different lengths of time that a car should be delivered, after shipment, to the various points to which they are sent."

Then follow the questions and answers giving the time to twenty-nine large cities in the United States, including New York City in which he says a car shipped from Greenwood or Ft. Smith, Ark., should arrive in "New York" on the "fifth morning."

"The method adopted in the shipment of perishable fruit to prevent decay, they are loaded in special equipment, and iced refrigerator cars. I am familiar with the different series used by the A. R. T. Company. The icing capacity of the ten thousand series is 2,000 pounds. The icing capacity of the nine thousand series is not quite so much. The icing capacity of the eight thousand series has a smaller ice chamber."

Q. Now Mr. Barrett, what would you say if cars were shipped from Greenwood, Ark., to these various destinations that I have mentioned loaded in good, sound, merchantable condition, crates fairly well packed and properly iced, would you expect them to arrive at destination in as good condition as they were shipped out in? (R. 85.)

A. The fruit being sound I would expect they would remain so.

The purpose is preserve the fruit.

Q. In your opinion will it preserve the fruit in the journey of which I have spoken if carried in the time I have indicated and kept fairly well iced?

A. Yes sir it has done it.

Q. Suppose a car was shipped from Greenwood, Ark., to some one of the different points which I have mentioned, and it was delayed on the road at some points along the road anywhere from one to three days, and on its arrival at destination it was found to have arrived in bad condition, more or less specked and more or less rotten, the specks and rotten being worse on top and at both ends; upon arrival at its destination it is found in the condition I have indicated with more or less rotten and more or less specked fruit, what in your opinion would or could produce that condition?

A. I believe good sound peaches well iced should carry in cars where they had proper attention in route from six to ten days, and in answer to your question that a delay of a car one day or two days or three days when it arrived specked on top or showing decay near the center of the load, that it has not been properly attended to in transit with ice.

Q. In your opinion, would that condition indicate that the car at some point in the shipment had got too warm?

A. Yes sir.

Q. What would cause it to get too warm in your opinion?

A. It might be a lack of ice or it might be improper ventilation of the car; might not be perfect in its refrigeration or ventilation.



Q. Do you know any other condition that would produce that condition in the fruit?

A. No sir.

Q. What would you say with proper attention whether it would get too warm or would properly refrigerate, in your opinion, would it get too warm or the refrigeration fail to work if it had proper attention?

A. I couldn't say for sure because some of these cars are—well I would just answer the question by saying the car didn't have proper attention or it would refrigerate.

Q. Now, I will ask you in regard to his eight thousand series. You have already said their capacity was small. I will ask you to tell the court whether in your opinion these eight thousand series have sufficient icing capacity to refrigerate cars of the capacity they load four hundred and ninety crates in?

A. In my opinion, the ice bunkers are not sufficient to refrigerate the minimum load we are required to put into it. (R. 86.)

There are three of these cars of the eight thousand series, to-wit: 8787, 8683, 8711.

The court will notice there is an allegation in the complaint that the bunkers in these cars were too small to hold a sufficient amount of ice to refrigerate the

cars so as to preserve the peaches. (Allegation four in the complaint R. 3.)

"I suppose ther ailroad company has about doubled its icing facilities during the last two or three years from what it was in 1907. The car should be re-iced, to make sure that it would refrigerate once every twenty-four hours. The car should be re-iced at every icing station in that time, that is my experience. If at some point along the road they didn't re-ice it the effect of this would be that the fruit would begin to deteriorate. The weather was very hot and dry the latter part of the shipping season of 1907." (R. 87.)

CROSS-EXAMINATION.

Among other things stated he shipped three hundred cars in 1907. (R. 88-89.)

RE-DIRECT EXAMINATION:

"My understanding was there was a regular schedule time for the train to reach St. Louis." (R. 89.)

R. C. CUMBIE testified:

"I was shipping agent for the Greenwood Fruit Growers' Association in 1907. To procure packing at Greenwood I sent to Georgia and Florida for twelve or fifteen expert packers so as to pack the peaches as the New York people wanted them packed. Mr. Taylor suggested that we hire these packers. We distributed them out at the different places one or two men to each

place. Mr. Carstarphen, (the commercial agent of the St. L., I. M. & S. Ry. Co.) agreed to furnish cars at Greenwood for the purpose of shipping the peach crop of 1907. We had an understanding with Mr. Carstarphen in regard to handling our peaches. He was here two or three times. I talked with him once or twice before we began to ship peaches. We wanted a fruit shed, but he said it was late in the season and advised that the proper thing to do would be to have plenty of iced cars on ground so that they could unload our peaches off the wagon into the car. He stated he would furnish all the cars we wanted. But he failed to do it." (R. 90-91). "We ran out of cars frequently." (R. 93.)

"J. B. Basinger was our inspector (R. 94.) There had been a notice put up, but it had been before that." (R. 95.)

See R. C. Cumbie's testimony. (R. 90-96.)

J. B. BASINGER testified:

"I was inspector at Greenwood during the season 1907.

"I inspected all that was shipped from the first car to the last."

Q. Tell the court what kind of peaches you loaded to be shipped?

A. Well, we tried to keep out everything that would be over ripe and at the beginning we had a right smart trouble with the packing at the fruit shed. We

had no experienced packers and we had to have quite a lot of them re-packed. After we got experienced packers we had no more trouble.

I don't think it was more than two or three days until we got the experienced packers. (R. 96.)

Basinger's testimony. (R. 96-101.)

TESTIMONY OF R. A. ROWE:

"I have copy of that notice."

Q. You may read it?

A. Notice to shippers of perishable goods. An ice famine prevails in this State and this company is unable to obtain a supply of ice to ice perishable shipments, St. Louis, Iron Mountain & Southern Railway Co., L. W. Rhodes, agent, Greenwood, Ark., July 23, 1907, 11:25 a. m. (R. 102.)

R. A. ROWE'S testimony (R. 102-107.)

Defendant's testimony:

Testimony C. E. Carstarphen, commercial agent of plaintiff in error.

CROSS-EXAMINATION.

Q. Mr. Carstarphen, at the time of this conversation do you remember that they told you that they would have seventy-five to one hundred cars of peaches loaded at Greenwood?

A. I don't remember. They probably told me though. (R. 109.)

Q. Mr. Carstarphen, it is alleged here they had an oral agreement with you and L. W. Rhodes at Greenwood, Ark., in the spring of 1907. Has our road ever agreed to furnish all the necessary cars from that station? Was there any such agreement made between you and Cumbie?

A. As I remember that I learned here Mr. Cumbie being at the head of the Fruit Growers' Association and called on him at his place in the country east of Greenwood early one morning. I don't remember just what was said at that time. It might have been that I stated at that time we would endeavor to furnish all equipment necessary. I know I had a conversation sometime in regard to that, but I don't remember just where it was or when it was. At any rate there was an understanding of that kind that they would give us that business if we would take care of it in the way of cars, etc. (R. 109.)

S. Caudle witness for plaintiff.

"I was there two nights with peaches on the wagons. I don't think there was any cars at all when the notice was put up." (R. 112.)

CROSS-EXAMINATION (R. 113.)

R. A. ROWE testified for plaintiff:

"I went over to the dock and looked at peaches while in New York in 1907. There is a man in charge who is called the dock master. 'They (peaches) are right there before your eyes. He is bound to know all about them. They are there before him and he is there in charge. It is impossible for a display to be made like it is made there without his knowing all about it. It is my understanding that they are taken over there just like Adam Miller said and like Mr. Goldsmith too. I don't know whether they call them ladder (lighters), that is the way they go over. Mr. Adam Miller told me the situation and how they were rotten. Well, I was informed that they were rotten and Mr. Miller says I want you and Mr. Goldsmith to go over and see those in cold storage.' 'I says alright.' And we all three went over there and saw the hands sorting. I never saw such a mass of peaches, your honor, in my life. It is a conservative estimate fifty per cent were rotten. I think it was the fifth day of August I was there.'" (R. 115.)

R. A. Rowe's testimony, (113-121.)

Testimony of R. C. Cumbie for plaintiff. (R. 121-123.)

Testimony of N. G. Cumbie for plaintiff. (R. 123.)

R. A. Rowe recalled for plaintiff.

"In the cars put separate on the dock the peaches are displayed with lids off so people can see them." (R. 130.)

The total amount of the judgment which includes interest on the amount found for each car at 6 per cent from the 10th day of August, 1907 until the 11th day of February, 1914, amounts to \$8,670.34. (See judgment 137-138.)

Intervention of R. C. Cumbie. (R. 138.)

Petition of plaintiff for re-hearing (R. 143-145.)

Judgment of The Supreme Court of Arkansas, Smith J. (147-151.)



## CROSS WRIT OF ERROR.

In the Supreme Court of Arkansas.

C. A. Starbird, Special Admr. Estate of Adam Miller,  
deceased, Appellant,

vs.

St. Louis, Iron Mountain & Southern Railway Com-  
pany, Appellee.

### PETITION, ASSIGNMENT AND PRAYER.

Considering himself aggrieved by the final decision of the Supreme Court and rendering judgment against them in the above entitled cause, the appellant thereby prays that writ of error upon the judgment and decision come up to the United States Supreme Court.

And the said C. R. Starbird, special administrator of the above aforesaid, assigns the following errors in the records and proceedings of said case.

#### I.

The Supreme Court of Arkansas erred in holding that the provisions in the bill of lading in this case came, to-wit: "Claims for damages must be reported by consignee in writing to the delivering line and in 36 hours after consignee has been notified of the arrival of the freight at place of delivery. If such notice is not there given, neither this company or any of the connecting or immediate carriers shall be liable."

## II.

Because the above provisions is against the Act of Congress, passed March 4, 1915, which provides: "That if the loss, damage, or injury complained of, was due to delay, or damage while being loaded or unloaded or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as the conditions preceded to recover them."

## III.

The cause of provision is unreasonable, in that it gives too short a time under circumstances in this case to give the notice attention in the stipulation.

## IV.

Because it is against the Act of Arkansas, passed April 30, 1907.

## V.

Because it is against the Hepburn Act and the Carmack amendments thereto.

## VI.

Because it limits the appellee's liability and is contrary to the common law.

## VII.

Because there was no consideration for said stipulation in bill of lading, and it was the general form used by the appellee.

### VIII.

Because there is no agent of appellee, named in the stipulation, upon whom to serve the notice therein mentioned.

### IX.

Because the appellee had actual knowledge of the damaged condition of the peaches in the five cars which this court reversed the judgment of the lower court.

### X.

Because the judgment of the lower court was based upon the ample testimony.

### XI.

Because the stipulation was substantially complied with.

### XII.

Because the court erred in the reversing of the judgment of the lower court as to the five cars, Nos. A. R. T. 8787, 9737, 9080, 9478, 8711, and in rendering the judgment against the appellant on those cars.

For which errors appellant prays that said judgment of the Supreme Court of Arkansas, dated June 15, 1915, be reversed and judgment rendered in favor of appellant for those cars.

ROBT. A. ROWE,  
Attorney for Appellant.

## BRIEF AND ARGUMENT.

The Supreme Court of Arkansas erred in upholding the following provision in the bill of lading, to-wit: "Claims for damages must be reported by consignee, in writing, to the delivering line within thirty-six hours after consignee has been notified of the arrival of the freight at the place of delivery. If such notice is not given, neither this company nor any of the connecting or intermediate carriers shall be liable."

The above stipulation in the bill of lading is against and in violation of the Act of Congress and should have been so held by the court. The object of the Carmack Amendment of the Interstate Commerce Act, June 29, 1906, was for the purpose of preventing such contracts as the above portion of the bill of lading.

Mr. Justice Hughes, in speaking for the court in the case of *New York, Philadelphia and Norfolk Railroad Co., Plaintiff in Error, vs. Peninsula Produce Exchange of Md.*, 240 U. S. 37, says:

"The amendment of Section 20 of the Interstate Commerce Act, known as the Carmack Amendment (Act of June 29, 1906, c. 3591, Section 7, 34 Stat. 584, 595), provides 'that any common carrier \* \* \* receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier \* \* \* to which such property may be delivered or over

whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier \* \* \* from the liability hereby imposed."

Congress passed an act on March 4, 1915, which provided "that if the loss, damage or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery." Vol. 38, Stat. Large, 1197.

The above statute is declaratory of what the law was before its passage, and is intended to prevent the courts of some of the State from deciding that stipulations in bills of lading requiring claims reported to the delivering carrier is a condition precedent to recovery.

The undisputed testimony in this case shows that the dock foremen on pier 29 is the agent of the delivering carrier in charge of the pier and dock, and that Adam Miller gave him notice of the damaged condition of the peaches involved in this suit and that he looked at them and walked away; therefore, the object of Section 442 of Hutchinson on Carriers has been complied with, as Adam Miller gave this notice as soon as the peaches were unloaded.

"But they (stipulations) are regarded as limitation of a carrier's liability, and are therefore as ineffectual against a claim for loss or injury due to the carrier's negligence (see Cyc., Vol. 6, p. 506, Note 40), and also as invalid where limita-

tion of common law liability is prohibited by statutes." See Cyc., Vol. 6, p. 506, Note 41.

(b) Reasonableness. "In general an unreasonable provision as to the giving of notice will not be binding; for instance, if there is indefiniteness and uncertainty as to the agent to whom notice is to be given, or an agent is named to whom it would be impracticable to give notice, or if there is no agent reasonably accessible." Cyc., Vol. 6, pp. 506, 507, and Notes 48 and 49.

"It is for the carrier relying upon the stipulation as a defense, to show that it is reasonable (see authority cited under Note 56), and it is said that question of reasonableness is for the jury." See authorities cited under Note 57, Vol. 6, Cyc., p. 507.

"And a substantial compliance with the stipulation is all that is required." See authorities cited in Note 64, Vol. 6, Cyc., Sec. 4, p. 509.

The case of *Kalina vs. Union Pacific R. Co.*, 69 Kan. 172, cited by appellant has ten days for the claim to be presented, and does not apply to the facts in this case.

The *Westminster*, 127 Fed. 680, says where the provision under the circumstances of the case is just and reasonable. The facts and circumstances in this case are very different from that case. In the case of *Manier vs. Western Union Tel. Co.*, 94 Tenn. 448; *Western Union Tel. Co. vs. Murray*, 68 S. W. 459, and *Express Co. vs. Caldwell*, 21 Wall. 264, do not apply to this case because the objects of the contracts are for different purposes, those cases 60 and 90 days, respectively, were allowed in which to file the claims. In the case of

A. J. Phillips Company vs. Grand Trunk Ry. Co., 236 U. S. 662, claims had been filed before the Interstate Commerce Commission on account of the railroad company increasing the freight on lumber 2 cents per hundred, and the commission held that it was an unjust rate which was sustained by the Supreme Court, but more than one year after the passage of the Hepburn amendment, and more than four years after the cause of action arose.

The quotation of appellant shows that it was sought by the plaintiff to interpose the statute of limitation of Michigan under the Conformity Act, but that rule does not apply under a cause of action arising under a statute which indicates its purpose to prevent suits on delayed claims. The quotation from this opinion and the opinion itself shows that the case has no application whatever to this case.

This case come up before the court is quite different from the case of St. L. & S. F. R. Co. vs. Kellar, 90 Ark., p. 308. In the above case it was not shown by any testimony, under the circumstances that the delivering carrier had notice, that the peaches were rotten, that the juice was running out of from one-third to one-half of them, that the crates were made of slats, and open so that the peaches could be seen in the crates; that there was an inspector of the delivering carrier who examined the peaches and saw and knew that they were rotten; that the dock foremen or agent of the de-



delivering carrier was called by the consignee and taken to and shown the rotten condition of the peaches as was done in this case. If this had been done, the decision of the court in the above case would have been for the defendant, as this court has always held, as well as all law writers and decisions of courts have held, so far as I have been able to find, by a long and careful search, state that the object and purpose of such stipulations in bills of lading is to give the delivering carrier notice of the condition of the fruit for shipment so that they will have an opportunity to examine the same and ascertain the condition for themselves and that where the delivering carrier has personal knowledge of the condition of the shipment, it is unnecessary to give the delivering carrier written notice of the condition of the shipment, as it already has this information, and that a provision requiring it under such circumstances would be unreasonable.

In addition of the above facts considered we believe that those agents or agent of the delivering carrier who unloaded these peaches had actual knowledge of the rotten and damaged condition of the peaches and could not help but have, under the testimony in this case showing that they were leaking out of more than a third of the crates, and the juice running out on the party or parties who unloaded them, and they could plainly see that the peaches were rotten through the crates, and in addition to this Adam Miller's hands were sorting the peaches and throwing the rotten ones

out, and the sound ones were put on the cars and sent over to the dock, and there the inspector and the dock foreman and other employes could not help but see and know that these cars had lost over half the peaches in being sorted.

If additional authority on the proposition that the notice or actual knowledge was sufficient be necessary, we call the court's attention to the recent case of *Southerland vs. Atlantic Coast Line R. Co.*, 74 S. E. 102, which involves a live stock contract of shipment. The court said:

"The evidence shows that it was the custom of the railroad company to send loaded cattle cars to the Union Stock Yard in Richmond to be unloaded. The evidence showed the consignee, Brauer, received the cattle under protest on account of the damage due to unnecessary delay en route. It is true this notice was given to one Lambert, who was in charge of the stock yards, but there is testimony tending to prove that he superintended the unloading of cattle of the railroad, that he was always at such unloadings, and worked for the railroad company in that way and looked after all cattle for the railroad when they came in. From the evidence we think the jury was fully warranted in inferring that Lambert was the agent of the railroad company in receiving and unloading the cattle, and that being so, notice to him would be in all respects a compliance with the terms of the contract. It would be unreasonable to require the consignee to search for some agent of the defendant than the one who was present, superintending the receipt and delivery of the cattle. Lambert was to all intents and purposes the agent of the railroad company and notice to him was notice to it."

The company was bound to have some agent rep-

resenting it in delivering those five cars of peaches to the Merchants' Refrigerating Company, and this agent was bound to know the damaged and rotten condition of those five cars of peaches because the testimony shows he could not have unloaded the peaches rotten to the extent these were rotten and could be plainly seen through the crates and the juice running out of the peaches on the party or parties unloading them without knowing they were rotten. This was some evidence for the verdict. It might have been given under the contract to any one of the following parties, to-wit: Some general officer, or to the nearest station agent of the defendant, or to the agent at destination, or some general officer of the delivering carrier. There was no agent at Harrell the destination, Camden was the nearest station of the defendant where there was a station agent. *Novakowich vs. Union Trust Co.*, 89 Ark. 412. The agent who delivered these cars was the agent of the company in charge of the company's business.

The words inspect-inspection, is defined as follows in vol. 4. Words & Phrases, page 3656. Webster defines "inspects" to mean to look to view and examine for the purpose of ascertaining the quality of condition of the thing to view and examine for the purpose of discovering and correcting errors, as to inspect the press or proof sheets of a book.

*Peope v. General Committee*, 49 N. Y. Supp. 723-728. 25 App. Div. 339. "Inspection" is derived from

a latin word "inspicere," to look into. Id. (Quot-Bouv Law Dic.) The "inspection" of a machine or appliance or of premises, to ascertain whether they are in good repair or good condition means a critical examination. *Armour v. Brazeau*, 60 N. E. 904, 907; 191 Ill. 117. "Inspector" is a name given to a person whose duty it is to make tests of machinery and it is a general recognized fact that when an officer or agent of any kind is instructed to inspect the duty goes beyond a mere survey of the eye, and implies such tests as are necessary to ascertain the quality of the thing inspected. *Fidelity and Casualty Co., v. City Seattle*, 47 Pack 963-964, 16 Wash. 445. Words & Phrases, vol. 4, pages 3658-3659.

"Where the facts stated show that the delivering carrier had actual knowledge of all conditions that a written notice could give it then the written notice is not required, and a provision requiring it under such circumstances would be unreasonable." 105 Ark., 413-414.

The testimony in this case, as to notice of the delivering carrier, is just the same as to the five cars, on which the judgment of the lower court was reversed, except as to the deposition of Adam Miller in answer to interrogatories 17 and 18 as to the five cars, where he said: "I don't know." All of his other testimony shows that the company had an inspector, who inspected every car; that was his business; that the dock fore-

man stacked every car in a pile and placed a board with a name of the owner, the number and initial of the car. In addition to this, D. T. Goldsmith said the inspector and dock foreman and the long shoreman knew all about it. That they could see the peaches in the crates when unloaded and the juice run out of them and they could not help but see and know about it. The Board of Health, as is shown by the undisputed testimony by D. T. Goldsmith, and Adam Miller condemned peaches out of almost every car, and the delivering carrier took them on their cars and dumped them in the Hudson River. Adam Miller could have made a profit of \$196 on the car, as shown by the testimony, if these peaches had been sound. Adam Miller's undisputed testimony shows that the Board of Health gave them notice they would dump those five cars that went to the Merchants' Refrigerating Company on account of being rotten, so that they could be sorted, which protected him and the railroad company.

In the first assignment of error by the plaintiff in error, we contend that the Supreme Court of Arkansas should have held the stipulation in the bill of lading void for the reason that it is against the Hepburn Act and the Carmack Amendment thereto, which is hereinbefore discussed, and said acts cited. And is also void on account of being against the act in Vol. 38, Stat. Large, 1197, which is declaratory of the common law. And has been hereinbefore cited.

And Assignment No. 2, the notice in the bill of lading being there for the purpose of giving the carrier an opportunity while the shipment is on the ground to examine and ascertain the extent of the injury, is certainly complied with, when the consignee gives the delivering carrier notice when he examines the shipment.

If the stipulation required claims for damages, reported by consignee, it is certainly sufficient, and that part of the stipulation to be complied with and the delivering carrier would certainly know the object of Adam Miller when he went to the dock foreman and told him that those peaches were rotten, that he meant to claim damages upon the carrier.

However, we have failed to find any decision of any court holding that the object of the stipulation required claims for damages to be reported to the consignee where the consignee knew all about the rotten and damaged condition of the peaches.

As to Assignment No. 3, there is nothing in Section 16 of the Act of Congress that requires a suit for damage to peaches shall be filed within two years from the time cause of action accrues.

The above provision applies to filing complaints before the Interstate Commerce Commission only, and after they find in favor of the claims, it allows one year in which to commence suit, based upon the finding of the commission.

The statute of Arkansas allows three years in which to commence such action. Sec. 5064. After a non-suit is taken the party has one year in which to commence action. Sec. 5083, Kirby's Digest.

Suit was commenced on the 7th day of July, 1908, for the peaches embraced in this action, and on the 6th day of July, 1908, counsel for plaintiff in error obtained an order from the Sebastian Circuit Court of the Greenwood District in moving the case to the United States Circuit Court for the Western District of Arkansas, where the suit remained until the 6th day of July, 1910, when an non-suit was taken, and on the 18th day of July, 1910, summons was issued and served on the same date, which was in three years next before the peaches were purchased or shipped.

The peaches did not arrive in New York, as is shown by the undisputed testimony, until from 10 to 17 days after they were shipped, which would make it about the 1st of August, 1907, before the damage to the peaches could have been known. We deem it unnecessary to discuss this assignment of error any further because the record of both the courts as above stated was before the Supreme Court of Arkansas, which finds that these cases were commenced, in the judgment of the court as above stated.

In Assignment of Error No. 4, the court could not have held otherwise unless it had arbitrarily disregarded the undisputed testimony of Adam Miller, B.



T. Goldsmith and Robt. A. Rowe, who testified that the dock foreman, the inspector, who was the representative and whose duty it was to inspect the peaches, every car of the delivering carrier as they arrived. And also longshoreman who unloaded the car, when all saw the juice running out of the crate from one-third to half of each car. Adam Miller did not know of any one else to give notice to but the dock foreman, who was the head man in charge of the delivering carrier Pier 29, handling and controlling all shipments to this pier.

It certainly would not be just or fair and reasonable to require Adam Miller to hunt any other person to whom to give notice of the rotten and damaged condition of the peaches, when he did not sign the bill of lading, did not know this stipulation was in it, and no agent of the company being mentioned in the bill of lading upon whom the notice should be served. This stipulation was made for the benefit of the plaintiff in error and should not have as liberal a construction for them as for the consignee; and should not have as liberal a construction as the law, both statutory and common, which is intended to prevent any such a harsh stipulation in bills of lading.

If the plaintiff in error had been as technical and particular in icing those cars and keeping them iced every twenty-four hours, and delivering them in New York City, within five days according to their schedule time and their contract with the growers and shippers

of these peaches and Adam Miller, it would not have been necessary for this suit, for the peaches would have arrived in merchantable condition and would have been paid for. Adam Miller making a profit of \$196.00 on the car and the owners of the fruit receiving their contract price for the same.

In that they failed to ice the cars and deliver the peaches according to the schedule time, its contract was violated and debreached on its part, which certainly releases the shipper from complying with the stipulation in the bill of lading under the law. The company cannot disregard every duty as common carrier and then insist on the defendant in error complying with every provision in the bill of lading, even going beyond being technical.

The testimony on the part of the defendant in error in the case is uncontradicted by any witness in the case; therefore, the testimony on the part of the defendant in error is undisputed.

Malcom Townsend's testimony on the 20th day of June, 1913, nearly two years after Adam Miller's testimony was taken, and yet he does not deny that the peaches were rotten, that the juice was running out, on the longshoremen, the inspector of the delivering carrier, whose duty is to inspect and ascertain the rotten condition of the peaches and does not deny that Adam Miller called the dock foreman and showed him the rotten and damaged condition of the peaches.

If Adam Miller had not been telling the truth about it, the plaintiff in error would have taken the testimony of the longshoreman who unloaded the cars, and the testimony of the inspector, whose official duty was that to ascertain the damaged condition of the peaches, and would have taken the testimony of the dock foreman to show that the peaches were not rotten and that Adam Miller did not show the rotten peaches to him. And this testimony would have applied to the ten (10) cars embraced in this action.

If the stipulation in the bill of lading were reasonable, it would be complied with when the fact was shown that the delivering carrier had an inspector at Pier 29 looking at and examining every car as it arrived. Because he was a representative, an agent of the company, and out there for that particular purpose, and the undisputed testimony of Adam Miller and B. T. Goldsmith shows that the delivering carrier's inspector looked at and examined every car. Although this was the case, Adam Miller did not stop at that, but went further, and he was required under the law or the stipulation and had the dock foreman to come around and look at the five cars upon which judgment was rendered, for the defendant in error.

The Supreme Court of Arkansas found against the defendant in error on the five cars as mentioned in the judgment of the court because Adam Miller said he didn't know to Interrogatory No. 17 and 18, losing sight of the fact that the delivering carrier had the

inspector there, whose duty it was to inspect and examine every car and, according to the uncontradicted testimony as before said of Adam Miller and Goldsmith, did examine every car as they arrived and saw that they were rotten and saw the juice running out of from one-third to one-half a crate in every car.

Notice to him was notice to the delivering carrier, for the inspector, as the word itself implies and means is, the one whose duty it is to make a thorough examination as to the condition of both cars and peaches.

In addition to what the name itself implies, the undisputed testimony of Goldsmith and Miller show that he did inspect and know the rotten and damaged condition of all of the cars embraced in this action.

As to Assignment of Error No. 5, the court could not have done otherwise than to have affirmed the judgment of the lower court as to cars A R T 10640, 8683, 10875, 10542, and 10052 under the undisputed testimony as has hereinbefore been mentioned.

“In certain relations which are usually entered into by contract, the law imposes a duty that arises from the relation rather than a contract, and if the duty be disregarded, the one who suffers may sue upon the agreement, or may treat the wrong as a tort, and bring an action analogous to that of trespass on the case. This duty arises on the part of carriers, innkeepers, attorneys, physicians, farriers, and others, etc. Thus, if a railroad conductor wrongfully ejects a passenger, an action for the tort will lie, although the person ejected is riding by virtue of contract.”

Bliss on Code Pleading, 3d Ed., Sec. 14,  
page 19.

Several causes of action may be united in the same complaint and belong to one of the following classes:

1. Claims arising out of contract. Then follows four other classes and the sixth and last class claims arising from injuries to persons and property.

Sec. 6079, Kirby's Digest:

CARRIERS OF GOODS—CLAIM FOR DAMAGES—AS TO TIME OF FILING.

"A provision of a shipping receipt or bill of lading that 'claims for loss or damage must be in writing to the agent at point of delivery promptly after arrival of the property, and if delayed for more than thirty days after the delivery of the property or after due time for the delivery thereof, no carrier herein shall be liable in any event,' is not a condition precedent, compliance of which must be established by the plaintiff in an action to enforce the carrier's liability, but is a limitation on the owner's right of recovery, which must be treated as a matter of defense, the burden of pleading and proving which is on the defendant."

Am. & En. Ann. C., Vol. 14, page 414.

Hoye vs. Penn. R. R. Co., 191 N. Y. 101.

Hoye vs. Penn. R. R. Co., 114 N. Y. App. Div.  
821, affirmed.

St. L., etc., R. Co. vs. Boshear (Tex.), 108  
S. W. 1032, affirmed 113 S. W. 6.

Richardson vs. New York Cent., etc., R. Co.,

122 App. Div. 120, 106 N. Y. S. 702.

"Of course the carrier must show that the shipper assented to the terms of the bill of lading if he seeks exemption from his common law liability."

Toledo, etc., R. Co. vs. Boaz, 130 Ill. App. 17.

Cleveland, etc., R. Co. vs. Pinnell, 134 Ill. App. 571.

Act of Arkansas of April 30, 1907:

"Section 1. Hereafter it shall be unlawful for any railroad or any of its agents or employes to enter into an agreement or contract with any shipper of any live stock, merchandise or other freight for the purpose of abridging, modifying, limiting or abridging the statutory and common law duties and liabilities of such railroad as a common carrier and all agreements and contracts made for that purpose are hereby declared to be void, and the same shall not be in force by any of the courts in this State.

"Section 2. All rules and regulations prescribed by any railroad for the transportation of any merchandise, live stock or other freight inconsistent with the common law and statutory duties and liabilities of railroads as common carriers, or that in anywise limits or abridges the statutory and common laws and rights for any such shipper, are hereby declared to be void and the same shall not be enforced by any of the courts of this State.

"Section 4. That all laws and parts of laws in conflict with this act are hereby repealed and that this act take effect and be in force from and after its passage.

"Approved April 30, 1907."

Acts of 1907, pages 557-8.

Under the above act stipulation in the bill of lading is void.

The stipulation is clearly against the Act of the Legislature. *St. L. & S. F. R. Co. vs. Keller*, 90 Ark. 312.

This provision in the bill of lading *abridges, modifies, limits and abridges the statutory and common law duties and liabilities.*

"The reasonableness of the stipulation requiring that notice of the claim for loss or damage shall be presented within a prescribed time must be determined from *all the facts and circumstances of the particular case.*"

"And the reasonableness of the stipulation depends upon whether a sufficient time is given by the exercise of reasonable diligence, to discover the loss or damage and give notice thereof."

*Baxter vs. Louisville, etc., R. Co.*, 165 Ill. 78, 45 N. E. Rep. 1003.

*Coles vs. Louisville, etc., R. Co.*, 41 Ill. App. 608.

*St. Louis, etc., R. Co. vs. Hurst*, 67 Ark. 407, 55 S. W. Rep. 215.

In *Southern Express Company vs. Hunnicutt*, 54 Miss. 566, the court, in discussing this question with reference to a lost package, said:

"Reasonable time would be time ample to ascertain the non-delivery of the package at the place of destination, which depends on the distance and facilities of communication."

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See also *Queen of the Pacific*, 180 U. S. 49, 21 U. S. Sup. Ct. Rep. 278.

"If delivery is to be made beyond the carriers' line, the reasonableness of a stipulation requiring notice to be given to one of its officers or agents depends upon whether the company has such officer or agent at the place of delivery to whom notice may be given."

*Missouri Pac. Co. vs. Harris*, 67 Tex. 166, 2d S. W. Rep. 574.

*Missouri Pac. R. Co. vs. Carnwall*, 70 Tex. 611, 8 S. W. Rep. 312.

"It has been held that it is for the jury to determine whether the time within notice of the claim for loss or damage is to be filed is reasonable."

*Texas, etc., R. Co. vs. Adams, etc.*, 78 Tex. 372, 14 S. W. Rep. 666.

*Gulf, etc., R. Co. vs. Wright*, 1 Tex. Civ. App. 402, 21 S. W. Rep. 80.

*Missouri Pac. R. Co. vs. Paine*, 1 Tex. Civ. App. 621, 21 S. W. Rep. 78.

*International, etc., R. Co. vs. Garrett*, 5 Tex. Civ. App. 540, 24 S. W. Rep. 354.

*Texas, etc., R. Co. vs. Barber* (Tex. Civ. App. 1895), 30 S. W. Rep. 500.

*Missouri, etc., R. Co. vs. Leibold* (Tex. Civ. App. 1900), 55 S. W. Rep. 368.

Southern Kansas R. Co. vs. Curtis (Tex. Civ. App. 1906), 99 S. W. Rep. 566.

A common carrier may in the absence of fraud, imposition or deception, enter into such stipulations, provided the period of time within which such claims shall be made is, under all the circumstances of each case, a reasonable one.

Pennsylvania Co. vs. Sherer, 75 Ohio St. 249, and cases cited.

Vol. 9, Am. and Eng. Ann. Cases, page 15.

In the case of ..... vs. .... S. W. Rep., the court holds that the burden is on the railroad company to show the reasonableness of the stipulation in the bill of lading by an allegation in the answer and testimony.

If the carrier files an answer which does not set up a failure to give notice as a defense and goes to trial, it thereby waives the defense of time and notice.

Keys-Marshall Bros. Livery Co. vs. St. L. I. M. & S. R. Co., 113 Mo. App. 144.

A common carrier cannot lawfully stipulate for exemption from responsibility when such a responsibility is not just and reasonable in the eye of the law.

1st Hutchinson on Carriers, Sec. 453.

"The contract of carriage, its wilful breach, and the insult and injury resultant, damaging ap-

pellee as he claims the sum was \$2,500.00 as set forth in the complaint, we hold constitute a tort. Under the reformed procedure, courts regard the substance rather than the form," etc., and authority cited.

Fordice vs. Nix, 58 Ark. 138.

The character of the action must be determined by the nature of the grievance, rather than the form of the declaration.

New Orleans, etc., R. Co. vs. Hurst, 36 Miss. 660.

"But, measured by the most technical rules of pleading, the complaint contains all the necessary allegations for an action *ex delicto*.

"A thirty-six-hour stipulation requiring notice to be given to the appellant under the testimony and circumstances in this case instead of being a condition of recovery is a complete exemption from liability on the part of the railroad company.

"Appellant is regarded as exercising in some sort, the functions of a public office, and the law is said to impose upon it, its duties and obligations upon this ground as well as upon the ground of the contract, and as soon as the delivery to him and his acceptance are shown, the law imposes the duty and responsibility in virtue of his public employment, in other words, his liability does not rest exclusively upon contract.

"However much it may be qualified or limited by express agreement."

Vol. 1, Hutchison on Carriers, Sec. 152.

Hutchinson on Carriers treats the condition limiting the time within which claims shall be made under

the head of "contract limiting liability" and all other law book writers as well as a great majority of the courts of last resort.

To call it a "condition of recovery" instead of limiting liability is a distinction without a difference. The stipulation in the bill of lading in this case limits the liability of appellant.

"Condition limiting time within which claims shall be made must be reasonable."

"The owner, however, will not be precluded from the right to recover for a loss or injury where, to require him to present a notice of his claim within a specified time, would be unreasonable."

Vol. 1, Hutchinson on Carriers, Sec. 443, p. 471, and authority cited as follows:

Central, etc., R. Co. vs. Soper, 59 Fed. 879,  
8 C. C. A., 341, 21 U. S. App. 24.

The Minnetonka, 132 Fed. 52.

Southern Express Co. vs. Caperton, 44 Ala.  
101.

Express Co. vs. Bank of Tupelo, 108 Ala. 517,  
18 S. O. Rep. 664.

Railway Co. vs. Steele, 6 Ind. App. 183, 33  
N. E. Rep. 236.

Richardson vs. The Railway, 62 Mo. App. 1.

Popham vs. Barnard, 77 Mo. App. 619.

Osterhoudt vs. The Railway, 62 N. Y. Supp.  
134, 47 App. Div. 146.

Jennings vs. The Railway Co., 127 N. Y. Supp.  
438, 28 N. E. Rep. 394.

Dixie Cigar Co. vs. Express Co., 120 N. Car.  
348, 27 S. E. Rep. 73, 58 Am. St. Rep. 795.

Memphis, etc., R. Co. vs. Holloway, 9 Baxt. 188.

Railroad Co. vs. Temple, 47 Kan. 7, 27 Pac.  
Rep. 98, 13 L. R. A. 362.

Goggin vs. Railway Co., 12 Kan. 416.

Missouri, etc., Ry. Co. vs. Paine (1st Tex. Civ.  
App.), 621 S. W. Rep. 78.

Railway Co. vs. Greathouse, 82 Tex. 104, 17  
S. W. Rep. 834.

Pecos, etc., Ry. Co. vs. Evans, etc., Co., 93 S.  
W. Rep. 1024.

"Carrier may waive benefit for such condition."

Section 444, Vol. 1, Hutchinson on Carriers, and  
authority cited as follows:

Bennet vs. Express Co., 12 Oreg. 49.

Merrill vs. Express Co., 62 N. H. 514.

Railway Co. vs. Traick, 80 Tex. 270, 15 S. W.  
Rep. 568.

Railway Co. vs. Ball, 80 Tex. 602, 16 S. W.  
Rep. 441.

Railway Co. vs. Jacobs, 70 Ark. 401, 18 S. W.  
Rep. 248.

Soper vs. Railway Co., 115 Mich. 443, 71 N.  
W. Rep. 853.

Railroad Co. vs. Grimes, 71 Ill. App. 397.

Railroad Co. vs. Johnson, 114 Ill. App. 545.

Railway Co. vs. Heath, 22 Ind. App. 47, 53  
N. E. Rep. 198.

Frankfurt vs. Weir, 83 N. Y. Supp. 112, 40  
Misc. 683.

Falkenburg vs. Railroad, 59 N. Y. Supp. 44,  
28 Misc. 165.

Hess vs. The Railroad Co., 40 Mo. App. 202.

Harned vs. The Railway, 51 Mo. App. 482.

Wood vs. The Railway, 118 N. Car. 1056, 24  
S. E. Rep. 704.

United States Watch Case Co. vs. Express Co.,  
120 N. Car. 351, 27 S. E. Rep. 74.

Hinkle vs. The Railroad Co., 126 N. Car. 932,  
36 S. E. Rep. 348, 78 Am. St. Rep. 685.

Railroad Co. vs. Bogard, 78 Miss. 11, 27 So.  
Rep. 879.

Railroad Co. vs. Lazarus, 13 Ky. Law Rep. 461.

"Where it is shown that the proper agents of  
the carrier had verbal notice of loss, and that they

acted upon it without demanding any written notice, promptly making all the investigation desired, a requirement that a written notice of loss or damage should be given with any certain time will be deemed to have been waived."

Railway Co. vs. Jacobs, 70 Ark. 401, 68 S. W.  
Rep. 248.

"Where the carrier fails to allege in its answer the existence of a condition requiring notice of claims within a certain time, or the manner in which the shipper has failed to comply with it, but goes to trial on an answer setting up other defenses, it will be deemed to have abandoned or waived the condition as defense."

Railway Co. vs. Pace, 69 Ark. 256, 63 S. W.  
Rep. 62, citing Hutchinson on Carriers.

"This is an action against a railway company to recover damages alleged to have been caused to live stock by the negligence and delay of the company in shipping the same. One contention of the company is that the plaintiffs cannot maintain the action for the reason that they did not comply with a provision of the contract of shipment requiring the shipper to give notice in writing of any loss or damage to the property while in the possession of the company within five days after it occurred. But if the company wished to avail itself of such a defense, it should have set it up in its answer. The plaintiff was not required to allege or prove that the stock was shipped under a special contract, to make the company liable, for, by virtue of the common law, it was liable as a carrier for all damages to property in its possession not caused by the act of God or the public enemy. If the company held a contract limiting its liability and relied as a defense upon the failure of the plaintiff to comply with the contract, it should not only have set up the contract, but should have stated the particulars in which plaintiff



had thus failed. As it did not do this in respect to the notice, but went to trial on an answer setting up several other defenses, but making no reference to the failure of the plaintiff to give the notice referred to, that defense, if any existed must now be treated as abandoned or waived." 69 Ark. 257, and authority cited as follows:

Bennett vs. Northern Pac. Exp. Co., 12 Oreg. 49.

Westcot vs. Fargo, 61 N. Y. 542, 551.

Hull vs. Chicago, St. P. M. & O. Ry., 16 Am. St. Rep. 722.

Witting vs. St. L. & S. F. R. Co., 20 Am. St. Rep. 636, and note.

Hutchinson on Carriers, Section 259.

"And it is held that a failure by the carrier to insert in the contract such information as is necessary to enable the owner to comply with its provisions with respect to giving notice will be equivalent to a waiver of the condition."

Vol. 1, Hutchinson on Carriers, Section 444.

Railway Co. vs. Reeves, 97 Va. 284, 33 S. E. Rep. 606, 15 Am. Eng. R. Case (N. S.) 166.

"The weight of authority, however, sustains a view that such a stipulation is more in the nature of a *limitation* upon the owner's right to a recovery, and that the burden of proof is accordingly on the carrier to show that the limitation is reasonable and that the owner omitted to present the notice in proper form or within the time stated."

Hutchinson on Carriers, Vol. 1, Sec. 447, citing the following authorities:

Cox vs. Railway Co., 170 Mass. 126, 49 N. E.  
Rep. 97.

Railway Co. vs. Ayers, 63 Ark. 331, 38 S. W.  
Rep. 515.

Railway Company vs. Pace, 69 Ark. 256, 63  
S. W. Rep. 62.

Railway Company vs. Greathouse, 82 Tex. 104,  
17 S. W. Rep. 834.

Missouri, etc., Ry. Co. vs. Paine, 1 Tex. Civ.  
App. 621, 21 S. W. Rep. 78.

Hatch vs. Railway Co., N. Dak., 107 N. W.  
Rep. 1087, citing Kahnweiler vs. Ins. Co.,  
67 Fed. 483, 14 C. C. A. 485.

Malloy vs. Railway Co., 109 Wis. 29, 85 N. W.  
Rep. 130.

Gatzo vs. Buenning, 106 Wis. 1, 81 N. W. Rep.  
1003, 49 L. R. A. 475, 80 Am. St. Rep. 1.

In all States where there is a law against stipulations limiting the carrier's liability they are held void.

The Supreme Court of Kentucky under the statute where common carriers are forbidden to contract against their common law liability limiting the time in which suit shall be commenced held void.

Hutchinson on Carriers, Vol. 1, Section 448.

The language is taken most strongly against the

carrier who is in the advantageous position for dictating the contract.

Id, Sec. 451.

All of the courts hold that under the following conditions the stipulation as to notice would not be binding where peaches are accepted for shipment without further consideration passing and the defendant issued the bill of lading afterwards.

The bill of lading issued in this case is the regular form and R. C. Cumbie knew that the agents could not and would not issue any other and there was no reduction made in the freight rates.

R. C. Cumbie did not sign the bill of lading. Peaches are perishable property which is well known to the railroad company as well as everybody else, and they were in their possession from the time of delivery at the point of shipment until the time and place of destination and they have a man whose business it is at the place of delivery to inspect and examine the condition of all perishable property.

The appellant knew that they were shipping these peaches without icing the cars and knew that they would rot, and where this is the case it was not necessary to give them written notice.

Our own Supreme Court has held that a stipulation requiring notice does not apply at destination where stock is found dead in the car, neither will it apply

where the company through its agent sees for themselves the rotten peaches in the car and sells and handles the peaches.

The law never requires a useless and silly thing to be done.

"A stipulation requiring notice of a claim for loss or damage within a prescribed time has no application to a claim for stock dead at the time of reloading or at the time destination is reached, as in such case the carrier is deemed to have notice of the loss and an opportunity to make proper investigation."

Kansas, etc., R. Co. vs. Ayers, 63 Ark. 331, 38  
S. W. Rep. 515.

Wichita, etc., R. Co. vs. Koch, 8 Kan. App. 642,  
56 Pac. Rep. 538.

Missouri, etc., R. Co. vs. Frogly (Kan. 1907),  
89 Pac. Rep. 903.

"It has been held that a stipulation requiring notice of a claim for loss or damage before the removal of the stock at the destination has no application to a claim for loss occasioned by the escape of stock while awaiting cars for transportation."

St. L., etc., R. Co. vs. Law, 68 Ark. 218, 57  
S. W. Rep. 258.

Justice Hughes, speaking for the court in 63 Ark.,  
above cited, says:

"The cattle that were dead in the car before the stock were removed and mingled with other cattle are not within this provision of the contract as to notice."

Therefore, the same is true as to the rotten peaches in above cars before they were removed and mingled with other peaches are not within this provision of the contract as to notice.

"Damages to cattle suffered by reason of the carrier's delay in furnishing cars for shipment are not covered by a stipulation in the bill of lading that 'as a condition precedent to any damages or loss or injury to stock covered by the contract, the shipper will give notice to the company before the stock is removed.'"

St. L. I. M. & S. Ry. Co. vs. Law, 68 Ark. 218.

It has been held that the reasonableness will depend upon whether sufficient time was given to discover the damage and report the loss.

St. L. S. F. Ry. Co. vs. Hurst, 67 Ark. 407.

"An injured animal is removed from the cars at an intermediate point, a stipulation requiring notice of the claim for damages to be made at the destination before removal is not applicable as the removal is made with the full knowledge of the carrier."

Chicago, etc., R. Co. vs. Ables, 60 Miss 1017.

"Nor does the stipulation apply where the agent of the carrier has actual knowledge of the injury and of the extent thereof."

Richardson vs. Chicago, etc., R. Co., 62 Mo. App. 1.

"Such a stipulation does not apply if the removal of the stock is made by the carrier, or if the consignee is offered no opportunity to remove the same."

Baker vs. Missouri Pac. R. Co., 34 Mo. App. 98.

Wilson vs. Wabash, etc., R. Co., 23 Mo. App. 50.

"A stipulation in a contract for the shipment of live stock, providing that notice of a claim for loss or damage shall be given, before the stock is removed, to the agent of the carrier, is unreasonable, and invalid, and unreasonable, if it does not state the name of such agent."

Galveston, etc., R. Co. vs. Short (Tex. Civ. App. 1894), 25 S. W. Rep. 142.

Smith vs. Louisville, etc., R. Co., 86 Tenn. 198, 60 S. W. Rep. 209.

Norfolk, etc., R. Co. vs. Reaves, 97 Va. 284, 33 S. E. Rep. 606.

"A stipulation requiring notice of a claim for loss or damage to be presented within a prescribed time in order to receive attention has been held not to bar an action for damages, although no notice were given as the stipulation was vague and uncertain."

Dun vs. Hannibal, etc., R. Co., 68 Mo. 268.

And it seems that if the stipulation does not explicitly state that a failure to give notice in accordance therewith will bar a recovery, it will not be given such effect.

Oxley vs. St. L., etc., R. C., 65 Mo. 629.

It has been held that if stipulation requires the notice to be given to a general officer of the carrier within the specified time, it is unreasonable and unenforceable.

Jones vs. Quincy, etc., R. Co., 117 Mo. 523, 94  
App. S. W. Rep. 735.

"Where a contract for the shipment of live stock provided that notice in writing for any claim in damages should be given before the stock was removed from the place of destination, and further that a failure to present a claim for such damages within 91 days should bar a recovery therefor, the court held that the provision of the stipulation were interdependent, inseparable and, as a whole, unreasonable, and therefor unenforceable.

Pecos, etc., R. Co. vs. Evans-Snider, Buel Co.  
(Tex. Civ. App. 1906), 93 S. W. Rep. 1024,  
affirmed (Tex. 1906).

97 S. W. Rep. 466.

"It has been held that while a stipulation requiring notice of a claim for damage to stock to be presented before the stock was removed from the place of destination or mingled with other stock is reasonable and should be complied with, the court will inquire, before enforcing the same, whether the carrier has been put to a disadvantage by the failure to give the required notice and if it has not, then the stipulation will not be allowed to bar a recovery."

Wood vs. Southern R. Co., 118 N. C. R. 1056,  
24 S. E. Rep. 704.

And it has been held that the failure to give the required notice will not bar a recovery if the shippers otherwise are entitled to recover specially if it is shown that he signed a receipt for the stock under protest.

Hinkel vs. Southern R. Co., 126 N. C. R. 939,  
36 S. E. 348.

The reasonableness of a stipulation requiring notice of the claim for loss or damages shall be presented within a prescribed time must be determined from all facts and circumstances of each particular case.

St. Louis & S. R. Co. vs. Keller, 90 Ark. 308.

St. L. I. M. & S. R. Co. vs. Dun, 94 Ark. 407.

Baxter vs. Louisville, etc., R. Co., 165 Ill. 78,  
45 N. E. Rep. 1003.

Coles vs. Louisville, etc., R. Co., 41 Ill. App. 608, and the reasonableness of the stipulation depends upon whether a sufficient time is given by the exercise of reasonable diligence, to discover the loss or damage and give notice thereof.

We deem it unnecessary to cite further authority.



## S U M M A R Y.

Cars 8787, 8711 and 8683 are defective and unsuitable in that the bunkers are too small and will not hold enough ice to preserve the peaches according to the uncontradicted testimony of J. A. Barrett, who has shipped peaches for 18 or 20 years all over the country.

The cars of peaches in this action were shipped in the latter part of July, 1907. The suit was filed against the plaintiff in error on the 7th day of April, 1908, which was shown to the Supreme Court of Arkansas by the certified copy of the record the bills of lading showing that date of shipment, the judgment of the court shows that these suits for these peaches were commenced in Crawford County, on the 18th day of July, 1910.

The plaintiff in error, posted a notice on the depot on the 23rd day of July, 1907, saying that they had no ice with which to ice the cars, with their own signature together with the signature of their agent at Greenwood. Before the shipping season commenced, C. E. Carstarphen, the commercial agent of the appellant, came to Greenwood and saw R. C. Cumbie, the shipping agent, of the Fruit Growers' Association and made a contract to ship all the peach crop of 1907 and to furnish all the necessary cars properly iced for the purpose of transporting the same.

The crop was estimated at from 75 to 100 cars. In the spring which was reported to Mr. Carstarphen, who acknowledges the contract and accepts on it, there were 75 cars shipped. The time agreed on from Fort Smith and Greenwood, which was the schedule time for the shipment of peaches was five days or the fifth morning in New York City.

The cars were in transit from nine to 17 days to Jersey City and it would take more time from there to pier 29 New York City.

There was a delay in transit between the place of shipment and destination from four to 12 days on every car as has been hereinbefore mentioned. The cars contained 4960 six-basket crates which were made of open slats so that the peaches could be plainly seen without opening the crates.

When the five cars arrived Nos. 10640, 8683, 10875, 10542, and 10052, being the cars upon which judgment was rendered the lower court for the defendants in error, being taken on lighters from Jersey City to pier 29, New York City, were unloaded by the long-shoremen and from one-third to one-half of the crates in every one of these cars were leaking with juice from the rotten peaches, running out on the men who were unloading them. The delivering carrier had an inspector who inspected and examined each and every one of these cars and saw that they were rotten.

D. T. Goldsmith, who was representing J. B. Payne, who was representing R. C. Cumbie, the agent and shipper of the Fruit Growers' Association at Greenwood for 1907 examined every one of these cars of peaches and found that they were rotten and leaking and that the long-shoremen, the inspector for the railway company and the dock foreman all saw that they were leaking and rotten from 50 to 80 per cent of the peaches in these cars were rotten and the juice running out of from one-third to one-half of a crate. Goldsmith was sent to New York and given the numbers of the Greenwood cars for the purpose of ascertaining their condition upon arrival.

Adam Miller testified that they were damaged by being rotten from 50 to 75 per cent, leaking and from one-third to one-half, that the long-shoremen, the inspector of the railroad company and the dock foreman all saw and knew that they were rotten. The Board of Health took the matter up and condemned from one to 200 crates in the cars and the delivering carrier carried them from the dock on their cars and dumped them in the Hudson river. The Board of Health told Adam Miller that if he allowed A. R. T. Nos. 8787, 9737, 9089, 9478, 8711, to come to the dock in their rotten condition they would require him to dump them in the river and for this reason he ordered them to the Merchants' Refrigerating Company, so that he could employ hands and sort them which he did and afterwards they were placed on cars and sent to the dock where they were

unloaded by the long-shoremen, inspected by the delivering carrier inspector and stacked and seen by the dock foreman, who knew that they arrived rotten at Jersey City, and were sent to the Merchants' Refrigerating Company for the purpose of being sorted.

Adam Miller states that he never give any receipt of any kind to Malcolm Townsend, showing that these cars were in good order, but that he gave an order to the railroad company to deliver these peaches to the Merchants' Refrigerator Company for the purpose of being sorted, so that it would help the railroad company and him too, in preventing them from losing all of these cars by being required to dump them by the Board of Health.

Adam Miller, D. T. Goldsmith, and Robt. A. Rowe on the 5th of August, 1907, were in New York together and went to the Merchants' Refrigerating Company in Jersey City and examined the above five cars and found them badly rotten and estimated by them to be damaged from fifty to seventy-five per cent.

Some times a crate of sound peaches would take from two to three crates to make it.

That Adam Miller had several hands sorting the peaches in those cars. The uncontradicted testimony of Adam Miller shows that the stipulation in the bill of lading was unreasonable and that the circumstances in this case, in that 36 hours was too short for him to

ascertain and report the damage. That it would be from two to four days before he could ascertain the amount of damage. The most that he could do in this length of time was as he did, to show the dock foreman the damage, which was done as soon as the peaches were unloaded.

Adam Miller was not allowed to enter the cars.

The peaches after being unloaded were placed in a stack containing the peaches from each car under the supervision of the dock foreman and a board placed on the stack containing the initials and number of the car and name of the consignee.

The lids were taken off of the top tier, so that purchasers could plainly see the contents of the crates.

The New York market opened at 12 o'clock at night and the buyers were admitted to the dock at 1:00 o'clock a. m. The top layers of the peaches were damaged much more than the lower tiers. J. A. Barrett, who has shipped peaches to the principal cities in the United States the last 18 or 20 years testified that the peaches being loaded firm, sound, and well-packed as the peaches in this case, nothing else could cause the damage except delay in transit, properly iced, re-iced every 24 hours, and proper care of car while in transit, all these peaches were packed by expert packers from Georgia and Florida. From one to two being placed at each packing pier and in addition

to this every crate of peaches being inspected while they were being loaded and nothing but sound, firm peaches being placed on the cars.

Adam Miller paid the freight, and refrigeration, which amounted to \$291.70 on each of these cars.

We think the stipulation in the bill of lading under the law is VOID, and unreasonable under the circumstances in this case.

We respectfully submit that the judgment of the Supreme Court should be affirmed on cars 10640, 8683, 10875, 10542 and 10052 and that this court reverse the judgment of the Supreme Court of Arkansas as to cars A. R. T. Nos. 8787, 9737, 9089, 9478, 8711 and render judgment here in favor of C. A. Starbird, special administrator.

Respectfully submitted,

CHAS. D. FOLSON,

ROBT. A. ROWE,

*Attorneys for C. A. Starbird,  
Special Administrator.*







Mississippi Court  
FILED  
JUN 3 1915  
JAMES O. MAH  
CL

No. 275

IN THE  
Supreme Court of the United States  
OCTOBER TERM, 1915.

\_\_\_\_\_  
Error to the Supreme Court of the State of  
Arkansas.

\_\_\_\_\_  
ST. LOUIS, IRON MOUNTAIN & SOUTHERN  
RAILWAY COMPANY, PLAINTIFF  
IN ERROR,

vs.

C. A. STARRIED, SPECIAL ADMINISTRATOR  
OF THE ESTATE OF ADAM MILLER,  
DECEASED, DEFENDANT  
IN ERROR.

\_\_\_\_\_  
Motion of Defendant in Error to Dismiss or  
Affirm, and Brief of Argument in  
Support Thereof

\_\_\_\_\_  
CHARLES D. FOLSOM,  
ROBERT A. ROWE,  
Attorneys for Defendant in Error.

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No. 694.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

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Error to the Supreme Court of the State of  
Arkansas.

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ST. LOUIS, IRON MOUNTAIN & SOUTHERN  
RAILWAY COMPANY, PLAINTIFF  
IN ERROR,

vs.

C. A. STARBIRD, SPECIAL ADMINISTRATOR  
OF THE ESTATE OF ADAM MILLER,  
DECEASED, DEFENDANT  
IN ERROR.

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**MOTION TO DISMISS OR AFFIRM.**

Now comes C. A. Starbird, Special Administrator of the Estate of Adam Miller, deceased, defendant in error herein, by his attorney, and moves

this Court in the alternative either to dismiss the writ of error herein or to affirm the judgment of the Supreme Court of the State of Arkansas, on the following grounds and for the following reasons, to-wit:

1. Because it appears from the record that the final judgment or decree in the Supreme Court of the State of Arkansas did not draw in question the validity of a treaty or statute of, or an authority exercised under, the United States, nor was its decision against the validity of any such treaty, statute or authority.

2. Because it appears from the record that said judgment did not draw in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, nor was its decision in favor of the validity or any such statute or authority.

3. Because it appears from the record that no title, right, privilege or immunity was claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, nor was the decision of the Supreme Court of the State of Arkansas any such title, right, privilege or immunity specially set up or claimed, by either party, under such Constitu-

tion, treaty, statute, or authority, nor was any Federal question raised in or considered by said Supreme Court of the State of Arkansas.

4. Said defendant in error also moves this Court in the alternative to affirm the judgment of the Supreme Court of the State of Arkansas on the ground that it appears from the record that said judgment is in accordance with the decisions of this Court, and that it is manifest that the writ of error herein was taken for delay only, and that the questions on which the decision of this cause depend are so frivolous as not to need further argument.

ROBERT A. ROWE,  
CHAS. D. FOLSOM,  
His Attorneys.

No. 694.

IN THE

**Supreme Court of the United States**

April Term, 1916.

Error to the Supreme Court of the State of  
Arkansas.

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ST. LOUIS, IRON MOUNTAIN & SOUTHERN  
RAILWAY COMPANY, PLAINTIFF  
IN ERROR,

vs.

C. A. STARBIRD, SPECIAL ADMINISTRATOR  
OF THE ESTATE OF ADAM MILLER,  
DECEASED, DEFENDANT  
IN ERROR.

---

**NOTICE OF MOTION, ACKNOWLEDGMENT  
OF SERVICE OF SAME AND OF  
COPY OF BRIEF.**

---

Thos. B. Pryor,  
Merchants National Bank Bldg.,  
Fort Smith, Ark.

Dear Sir:—

You are hereby notified that a motion to dis-  
miss the writ of error herein or to affirm the judg-

ment of the Supreme Court of the State of Arkansas will be filed in the Supreme Court of the United States, under Rule 6 of the Rules of said Court, and that said motion will be submitted to said Court on Monday, June 5th, 1916.

ROBERT A. ROWE,

CHAS. D. FOLSOM,

Attorneys for Defendant in Error.

Service of the foregoing notice and of a copy of the Motion therein referred to, and a copy of the brief of argument in support thereof, is hereby acknowledged, this 15th day of May, 1916.

THOS. R. PRYOR,

Attorney for Plaintiff in Error.

## **HISTORY OF THE CASE.**

A suit for these ten cars was originally instituted on the 7th day of April, 1908, in the Greenwood District of Sebastian County, and on the 6th day of July, 1908, removed to the United States Court, for the Western District of Arkansas, where the suit remained until July, 1910, at which time a non-suit was taken; thereafter the suits were filed in the Crawford County, Arkansas, Circuit Court on the 18th day of July, 1910, within less than three years after the peaches were shipped.

The petition appears on record pages 1-6 and alleges that St. Louis, Iron Mountain & Southern Railway Company accepted ten cars of peaches for shipment from Greenwood, Arkansas, to New York City; that on account of negligence in failing to ice and re-ice the cars and delay in transit for eight days, over the agreed schedule time, and other acts of negligence, by reason of which the peaches arrived in a rotten and damaged condition so that the defendant in error was damaged in certain sums of money, as set out in the complaint for each one of the ten cars, there being a separate suit for each car, ten suits in all, which were consolidated and tried together.

The answer denies the allegations of the complaint and appears on record pages 6-11. The



trial resulted in a judgment before the court in a certain sum on each car and a total sum of \$8,670.34 as damage with 6% interest from date until paid (Record p. 138).

St. Louis, Iron Mountain Southern Railway Company appealed to the Supreme Court of Arkansas (R. 20-141).

In due time the case was heard on its merits and the judgment of the court below was affirmed on the following five cars, to-wit: A. R. T. 10640, A. R. T. 8683, A. R. T. 10875, A. R. T. 10542 and A. R. T. 10052, and reversed and dismissed the judgment as to the following five cars which have the same initials, to-wit: 8787, 9737, 9089, 9478 and 8711 (R. 142-143).

The opinion of the Supreme Court of Arkansas is found on pages 147-151 of the record, and is as follows:

## OPINION.

“The suits embraced in this appeal were originally begun on the 7th of April, 1908, and those causes were removed to the Federal Court, Western District, of this state where non-suits were taken in July, 1910, and thereafter the suits were again brought in the Greenwood District of the Sebastian Circuit Court. Ten car loads of peaches are involved in this litigation, and there were originally ten suits, but the causes were consolidated and tried together and a single appeal has brought the judgment in all the cases before us for review.

“The peaches were shipped from Greenwood, in Sebastian county, to Adam Miller, in New York City, and suit was brought by Miller to recover damages to compensate the loss sustained to the peaches in transit. Miller died before final judgment, and the cause was revived in the name of a special administrator.

“There was proof to support the finding of the court below that the damage to the peaches resulted from the failure of the railroad to ship the peaches promptly and to ice them properly, and the evidence was also sufficient to sustain the amount of damages found by the court in the case of each of the cars.

The bills of lading for the respective cars all contained the provision that the carrier should not be liable for any damage sustained to the peaches unless written notice was given within 36 hours after the arrival of the peaches at their destination of the damages sustained. It was alleged in the complaint that a written notice had been given, but the proof is insufficient to sustain that allegation. It is very earnestly urged, however, that personal notice was given and that the delivering carrier had such actual knowledge of the damage done the peaches as that a written notice was unnecessary and would have advised the delivering carrier of a fact about which it already had full information. The proof on the part of appellee was to the effect that the cars were delivered at the railroad terminal in Jersey City, after which they were switched from the road to a lighter, which was ferried across the Hudson River to a pier, number 29, which was devoted to the reception of perishable fruits. The cars were taken from the lighter to the dock, which was entirely closed, and no one was allowed inside the dock until the cars had been unloaded and the fruit placed in piles, the crates of peaches in each car being placed in a separate pile. The cars were unloaded by employees of the railroad company, and at midnight bulletins were posted up showing

the car numbers and the dealers to whom the fruit was consigned and at 1 o'clock in the morning the dock doors were opened and the dealers permitted to go in and get their peaches. But no one was permitted in the dock until the peaches were ready for delivery, and no consignee would know whether the cars consigned to him had been received until midnight when the bulletins were posted. The custom was that, if the peaches were sound, they were sold at the dock and were usually gotten rid of before noon of the day of their receipt; but, if many of them were bad, and had to be sorted out, the authorities at the dock required the consignee to haul the peaches to their places of business and there sort them out, at which time the sound fruit would be repacked in crates and the faulty fruit thrown away.

“It is insisted on behalf of appellees that the delivering carrier was necessarily charged with notice of the condition of the fruit at the time of its arrival at its destination; that this is so because the delivering carrier had inspectors at the dock whose business it was to inspect and ascertain the condition of the various shipments and that the consignments here involved were in such bad shape that the carrier must necessarily have known that considerable damage had been sustained, as the fruit was shipped in crates which

were open so that from a superficial examination it could be seen that the fruit had discolored and had become specked and that large quantities of juice from the fruit had run out of the crates and over other crates and that these crates could not have been handled without the railroad company acquiring this knowledge.

“The deposition of Adam Miller was taken upon interrogatories in each of these cases, and in five of those depositions he was asked this question: ‘Interrogatory No. 17—State whether you, or any of your employees, told any of the employees of delivering carrier of the damaged condition of the peaches in said car, and whether or not employees of said railroad company went into the car and inspected the peaches, and, if they did not go into the car, did they unload or see the peaches unloaded, and knew of the damaged condition of the peaches, giving name of employee, if you know, and the position he holds with the company?’

“His answer was, ‘I don’t know.’

“The following question was also asked: ‘Interrogatory No. 18—State if you know whether the railroad company, at that end of the line, had an employee to inspect said car of peaches and knew of the condition of the peaches in which the car arrived?’

“Answer to Interrogatory No. 18: ‘I don’t know.’

“These questions were asked and answered given in regard to the following cars involved in this litigation, to-wit: A. R. T. 8787, A. R. T. 9737, A. R. T. 10756, A. R. T. 9478, A. R. T. 8711.

“But different answers were given in regard to the remaining five cars, which had the same initials and were numbered as follows: 10640, 8683, 10875, 10542, 10052. As to these last numbered cars the witness answered Interrogatory No. 17 as follows: ‘I called the attention of the dock foreman to the bad peaches, and told him they were not iced and had gone bad. I do not know the dock foreman’s name. He is in the employ of the Pennsylvania Railroad, which owns the dock where the peaches were unloaded from the car which was lightered from Jersey City to New York. I don’t know his name. He looked at them and went away.’ And, in response to Interrogatory No. 18, he testified: ‘The railroad company has a man at the dock who inspects the peaches as they come on the dock off of the cars and see the condition in which they arrive in.’

“We have today handed down an opinion in a companion case. See St. L., I. M. & S. Ry. Co. vs. Cumbie et al., Ms. Op. In that case we reviewed

our previous decisions on the question of the validity of the stipulation contained in the bill of lading requiring notice to be given of the damaged condition of the goods within 36 hours after arrival at their destination. The validity of the stipulation was again upheld in that case, as it had been in several prior decisions and the judgment recovered in that case was reversed because the proof did not show a compliance with this condition. The case also stated the rule as to the circumstances and conditions under which the knowledge of the carrier in regard to the condition of the damaged goods would be held to dispense with the necessity of giving the notice. That opinion, quoted with approval from the case of *Cumbie vs. S. L., I. M. & S. Ry. Co.*, 105 Ark., 406., used the following language:

“ ‘Where the facts stated show that the delivering carrier has actual knowledge of all the condition that a written notice could give it then written notice is not required, and a provision requiring under such circumstances would be unreasonable.’

“The purpose of this notice is manifest, and has been stated in our decisions unholding it. Its object is that the carrier may inspect the goods and ascertain the nature and extent of the damage while the truth in regard to any claim for damages

may be known. But where the carrier possesses this information independently of the notice, the giving of the notice can serve no necessary purpose. It is insisted that the carrier should be charged with notice of any information possessed by any of its servants or employees. But we can not agree with this contention. None of our cases hold, nor has it been so held in the decisions of any other jurisdiction of which we are aware. To so hold would render the provisions in regard to notice practically nugatory. In the present case the laborers unloaded the cars were called longshoremen and some of these men unquestionably knew that some of the peaches contained in the cars were in a damaged condition; but this is not the knowledge contemplated by the bill of lading. To comply with the terms of the bill of lading it is essential, either that the notice be given to the company in writing, or, if this is not done that personal notice be given to that employee or agent of the company whose duty it would be, if written notice had been received to make the inspection to ascertain the nature and extent of the damage, if such employe or agent does not already possess this knowledge. These longshoremen were under no duty to inspect the peaches. They had no duty to perform except that of taking the crates of peaches out of the cars and piling them on the dock,



and they would not know whether written notice had been given to the company or not, and there is nothing in the record to indicate that any duty of inspection would have devolved upon them had the written notice and fact been given. There is much evidence in this record tending, on the one hand, to corroborate Mr. Miller, and, on the other hand, to contradict him. But we are not called upon to weigh this evidence nor to pass upon the credibility of the witnesses. It is our duty simply to determine whether or not the evidence is legally sufficient to sustain the verdict. We will not undertake to review the evidence in detail, but state our conclusion to be that as to the five cars first mentioned, there was no proof of knowledge of the damage to sufficient to supply the failure to give the notice in writing provided for by the bill of lading and as to those cars the judgment must be reversed, and as the case has been fully developed the suits as to them will be dismissed. But we think a different rule must be applied to the last five mentioned cars. As to them the proof showed that the peaches were placed in piles as they were unloaded from the cars and that neither the consignee nor his representative was allowed in the dock until after the cars had been completely unloaded, and that Miller went to the foreman of the dock, who was the man in authority

there, and reported to him the damaged condition of the peaches, and that the foreman went with Miller to these peaches and saw the peaches, but left without making any comment and that this foreman was a representative of the delivering carrier. The proof further shows that an inspection of the peaches by the railroad company could have been made then and there. The answer to the 18th Interrogatory shows that the railroad company maintained an inspector at the dock. Yet, notwithstanding this fact, we do not hold the railroad company liable for the first five mentioned cars because the proof does not show that this inspector had any duty to perform concerning them. Upon the other hand, we can not assume that there was any uncertainty about Miller's purpose in hunting up the dock foreman and reporting to him the condition of the five remaining cars and in going with this foreman to the piles of peaches about which the complaint was being made. The proof does not show that Miller stated to the dock foreman that it was his intention to sue for the damage to the peaches; but it is not indispensable that the written notice should have contained this statement. The purpose and effect of Miller's statement to the foreman was to advise the representative of the delivering carrier in authority of the fact that damage had been done, and the giving

of this notice under the circumstances must be held sufficient to charge the delivering carrier with knowledge of the fact that compensation would be claimed.

“The depositions of Miller, upon motion of appellant, had been suppressed at a former term of court for the reason, principally, that the certificate of the notary was defective. This certificate was amended, and upon motion of appellee the court set aside its former order suppressing the deposition and permitted them to be read upon the hearing of the case. There was no intimation that the integrity of the depositions had not been preserved, neither was there any question about the depositions having properly transmitted by the clerk. No prejudicial error was committed in this respect. As to the five cars last mentioned the judgment will be affirmed; but as to the others the judgment is reversed and the cause dismissed.”

## **ASSIGNMENT OF ERRORS IN SUBSTANCE.**

1. That the Supreme Court of Arkansas erred in holding that it is unnecessary for consignee to give written notice under the bill of lading when the delivering carrier saw and had actual knowledge of the damaged condition of the peaches.

2. The court erred in holding that knowledge of the dock foreman of the damaged condition of the peaches upon arrival was notice to the company and that it was unnecessary to give notice in writing within 36 hours after notice of arrival of shipment, of an intention to claim damages.

3. That the court erred in refusing to hold and decide that the plaintiff was not barred from recovering in these suits under the provision of Section 16 of the Act of Congress which provides that all claims to recover damage shall be filed within two years from the time the cause of action accrued.

4. That the court erred in holding and deciding that the delivering carrier had actual knowledge of the damaged condition in which the peaches arrived that were shipped in A. R. T. cars Nos. 10640, 8683, 10875, 10542, 10052.

5. That the court erred in affirming the judgment of the lower court as to five cars Nos. A. R. T.

10640, 8683, 10875, 10542, 10052, and in rendering judgment against the appellant for the amount of the alleged loss on said five cars of peaches (R. 152).

Congress passed on Act which provides "That if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery." (Act. March 4, 1915.) This is declaratory of what the law was before the passage of this Act.

It is manifest that there is no Federal question in the above assignments. If there were a Federal question in the above assignments, this court, by the many decisions hereinafter cited, has held that Federal questions can not be introduced into a case by the assignment of errors, for a writ of error, or by the judge allowing them in the writ of error. On the contrary the court holds that the Federal question must have actually been in the case before the court, for its decision, and actually decided and passed upon by the court, before this court has jurisdiction. The record shows there is no Federal question in this case, and none passed on by the court. Even the assignment of errors shows there is no Federal question in it; although

it is sought to show one or more in order to secure a writ of error by merely referring to the interstate commerce Act which has no application to this case.

Thus far the complaints and answers and the remainder of the record contains absolutely no reference to any Federal Questions. Neither in the petitions in error, nor in the journal entries of affirmance, nor in the opinion of the Supreme Court is there any intimation of the existence of a Federal question, or anything to call that court's attention to the fact that a right under the Federal Constitution was being relied upon. It is sought to make its initial appearance in the assignment of errors filed with the petition for a writ of error to the United States Supreme Court and in the writ of error issued thereon (R. pp. 151-155). In this state of the record we contend that the writ of error should be dismissed by this court for want of jurisdiction.

## ARGUMENT.

Since the record fails to show that any Federal question was raised in the state courts, or was considered or decided by them, the Writ of Error herein should be dismissed for want of jurisdiction.

It appears and is manifest from the assignment of errors (R. 151-152) that no Federal question, rights, privileges and immunities guaranteed it by the Federal law or Constitution is involved in this Assignment of Errors, much less the case.

We have already stated that nowhere in the record of the proceedings in the state courts is there any intimation that any rights under the Federal Constitution, or law were being claimed by the St. Louis, Iron Mountain & Southern Railway Company, and that such claim first is sought to be made to appear in the Assignment of Errors, which manifestly shows to the contrary, filed with the petition for Writ of Error. Let us now proceed to a closer examination of the record. The complaint or petition prays for the recovery of over \$6,338.50 representing damage claimed on account of negligence in icing, re-icing and the delay of all the cars in transit from Greenwood, Arkansas, to New York City (R. 1-6 and R. 11).

In the latter part of the answer it is alleged: "That said shipment was governed by the rules of

the Interstate Commerce Commission which requires that all complaints for the recovery of damages must be filed within two years from the time the cause of action accrued." (R. 11.) The first two assignments misstates what the court decided as reference to the opinion will show. These grounds are unheard of in the case except in the Assignment of Errors. Opposing counsel seeks to introduce Federal questions by asserting for the first time in the Assignment of Errors, that the Act of Congress has to do with it, which is contrary to and against all the hereinafter decisions of this court.

The Interstate Commerce Act of June 29th, 1906, amendatory to the Act regulating Interstate Commerce, has no application whatever to this case. It is cited by the plaintiff in error for the purpose of showing that the two year statute of limitation allowed to present claims to the Interstate Commerce Commission, applies to this case. After a claim is presented to the Interstate Commerce Commission within two years and they find for the party who presents it, one year is allowed by the above Act in which to bring suit. After the judgment of the lower court is affirmed as to five cars then Assignment of Errors is enlarged so as to include the other assignments for the first time in order to secure a Writ of Error which this



court by the many opinions says cannot be done in any case.

In the history of this case it is shown that suit was brought within less than one year after the shipment of peaches. The Statute of Arkansas allows three years in which to bring such suits, Section 5064, Kirby's Digest. One year after non-suits.

It is perfectly clear from an examination of the complaint in this case (R. 1-6) and the answer thereto (R. 6-11) that no Federal question either under the law or Constitution is involved in this case. An examination of the Assignment of Errors, although not allowed under the law to inject such question in this case, does not in any of the five assignments of error, even remotely refer to any Federal question or in any way call the attention of the court to the fact that it was asked to pass upon any right or privileges that the St. Louis, Iron Mountain & Southern Railway Company was claiming under the Federal Constitution or laws (R. 151-152). The judgment of the Supreme Court affirming the judgment of the lower court shows that no Federal question was raised in it, or considered, or decided by the Supreme Court, and that no title, right, privilege or immunity under the Federal Constitution was in any way set up or claimed

by either party, or was considered or decided by the court.

Moreover, the court's opinion, found on pages 147-151 or the record, neither refers to nor discusses any such issue, but on the other hand shows that the case was decided upon the law and the testimony before the court, as was disclosed by the transcript, except as to the five cars where the judgment of the lower court was reversed.

Thus, nowhere in the transcript of the proceedings in the state courts—from the commencement of the action to the final affirmance as to five cars and reversal as to five in the opinion by the Supreme Court—is there the slightest reference to a claim, the existence and denial of which are essential to the jurisdiction of this court. On the other hand, the so-called Federal question is first sought to be made appear in the Assignment of Errors, which shows that there is no Federal question involved, filed with the petition for writ of error to the United States Supreme Court, October 7, 1915 (R. 151-153).

This Court has many times held that where the Federal question was raised the first time in the petition for writ of error and assignment of errors, this Court is without jurisdiction. In Man-

hattan Life Ins. Co. vs. Cohen, 234 U. S., 123, Mr. Chief Justice White said (p. 134):

It is elementary that a Federal question may not be imported into a record the first time by way of assignments of error made for the purposes of review by this court."

In Cleveland & Pittsburg R. R. Co. vs. City of Cleveland, Ohio, 235 U. S., 50, it was said by Mr. Justice Day (p. 53):

"In order to bring a case here under Sec. 237 of the Judicial Code (formerly Sec. 709 of the Revised Statutes of the United States), it is well settled that the Federal right must have been set up and adjudicated against the claimant by the judgment of the state court. It is equally well settled that the contention made and passed upon in the state court can not be enlarged by assignments of error made to bring the case to this court. This proposition is too well settled to need discussion." (Citing authorities.)

In Appleby vs. Buffalo, 221 U. S., 524, it was said (p. 529):

"But it is well settled that the assignments of error made for the purpose of bringing the case to this court can not be looked to for the purpose of originating a right of review here."

In Thomas vs. Iowa, 209 U. S., 258, the Court, in referring to the Federal question, said (p. 263):

“It is too late to raise it for the first time in the petition for writ of error from this court or in the assignments of error here.”

In *Warfield vs. Chaffe*, 91 U. S., 690, the syllabus, which well states the law of the case, reads as follows:

“The petition for the allowance of a writ of error forms no part of the record of the court below; and this court has no jurisdiction to determine a Federal question presented in such petition, but not disclosed by the record sent here from the state court.”

That this is the law even where the Chief Justice of the highest Court of the state allowed the writ, as was done in the case at bar, is held in *Hulbert vs. Chicago*, 202 U. S., 275, where this court, speaking through Mr. Justice McKenna, said (p. 280):

“It is urged that in the writ of error and petition for citation it is stated that certain rights and privileges were claimed under the Constitution of the United States, and that the Supreme Court of the State of Illinois decided against such rights and privileges, and it is further urged, that the Chief Justice of the Court allowed the writ of error. This is not sufficient. *Marvin vs. Trout*, 199 U. S., 212, 223.”

On the other hand it has been repeatedly held

that in order to give this court jurisdiction it must affirmatively appear from the record that the right or privilege claimed under the Federal Constitution was clearly and unmistakably set up in the highest court of the state. We will refer only to certain leading cases.

In *Crowell vs. Randell*, 10 Pet., 368, the second syllabus, which is in the language used by Mr. Justice Story in the opinion (p. 391), reads as follows:

“In the interpretation of this section of the Act of 1789, it has been uniformly held that to give this court appellate jurisdiction, two things should have occurred and be apparent in the record: first, that some one of the questions stated in the section did arise in the court below; and secondly, that a decision was actually made thereon by the same court in the manner required by the section. If both of these do not appear on the record, the appellate jurisdiction fails. It is not sufficient to show that such a question might have occurred, or such a decision might have been made in the court below. It must be demonstrable that they did exist, and were made.”

In *Maxwell vs. Newbold*, 18 How., 511, Mr. Chief Justice Taney, in referring to the power of this court to review a constitutional right denied by the state court, said (p. 515):

“But to bring that question for decision in this court, it is not sufficient to raise the objection here, and to show that it was involved in the controversy in the state courts and might, and ought, to have been considered by it when making its decision. It must appear on the face of the record that it was, in fact, raised; that the judicial mind of the court was exercised upon it; and their decision against the right claimed under it.”

In *Oxley Stave Co. vs. Butler County*, 166 U. S., 648, the syllabus, which well states the law of the case, reads as follows:

“This court cannot review the final judgment of the highest court of the state even if it denied some title, right, privilege or immunity of the unsuccessful party, unless it appear from the record that such title, right, privilege or immunity was ‘specially set up or claimed’ in the state court as belonging to such party under the constitution or some treaty, statute, commission or authority of the United States. Rev. Stat., Sec. 709.

“The words ‘specially set up or claimed’ in that section imply that if a party in a suit in a state court intends to invoke for the protection of his rights the Constitution of the United States, or some treaty, statute, commission or authority of the United States, he must so declare; and unless he does so declare, ‘specially,’ that is unmistakably, this court is without authority to re-examine the final judg-

ment of the state court. This statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a Federal right is left to mere inference."

In the opinion, which was rendered by Mr. Justice Harlan, this court said, (p. 655):

"The jurisdiction of this court to re-examine the final judgment of a state court can not arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right."

See the to same effect:

Hamilton Co. vs. Massachusetts, 6 Wall., 632.

Spies vs. Illinois, 123 U. S., 131.

Sayward vs. Denny, 158 U. S., 180.

Chicago & Northern Ry. Co. vs. Chicago, 164 U. S., 454.

Mutual Life Ins. Co. vs. McGrew, 188 U. S., 291.

Capital Bank vs. Cadiz Bank, 172 U. S., 425.

Michigan Sugar Co. vs. Michigan, 185 U. S., 112.

Waters-Pierce Oil Co. vs. Texas, 212 U. S., 86.

In *Waters-Pierce Oil Co. vs. Texas*, 212 U. S., 112, it was said, (p. 115):

“It is well settled in this court that a review of the judgment of the State Court is confined to the assignments of error made and passed upon in the judgment of the State Court brought here for review.”

See also:

*Simmerman vs. Nebraska*, 116 U. S., 54.

*Texas etc. Ry. Co. vs. Southern Pacific Co.*,  
137 U. S., 48-52.

*Powell vs. Brunswick County*, 150 U. S., 433,  
435.

*Miller vs. Texas*, 153 U. S., 535, 538.

The foregoing cases conclusively show that on the record in the case at bar this court is without jurisdiction. Not only does the record fail to show clearly and beyond question that the St. Louis, Iron Mountain & Southern Railway Co. was claiming rights under the Federal Constitution in the Supreme Court of Arkansas, but on the other hand, the entire record of the proceedings in the state courts is utterly silent upon that subject.

On this state of the record we respectfully submit that the writ of error should be dismissed.



In the event, however, that the court holds that it has jurisdiction, we then submit that under Section 5 of Rule 6 of this court the judgment should be affirmed.

The judgment of the Supreme Court of Arkansas should be affirmed, and hence it is manifest that the Writ of Error was taken for delay only, and that the question on which the decision of the cause depend are so frivolous as not to need further argument.

The Court will grant the motion to affirm the judgment where the appeal is taken only for delay, (The S. C. Tyron, 105 U. S., 270), or where the Federal question is clearly frivolous.

Chanute City vs. Trader, 132 U. S., 212.

The court is so familiar with this question, which is so clearly settled by the many decisions, that we deem it unnecessary to cite further authority. It is manifest that the writ of error and appeal should be dismissed or the judgment of the lower court affirmed.

Respectfully submitted,

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